No. 93-356-CFX
Status: GRANTED

Title: MCI Telecommunications Corporation, Petitioner
v.
American Telephone and Telegraph Company

Docketed:
September 2, 1993

Court: United States Court of Appeals for
the District of Columbia Circuit

Vide:
93-521

Counsel for petitioner: Salsbury,Michael H.

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SOC OUT. RBG OUT.

Entry	Date	Note	Proceedings and Orders
1	Sep 2 1993	G	Petition for writ of certiorari filed.
3	Sep 28 1993		Order extending time to file response to petition until November 3, 1993.
4	Sep 28 1993		This extension is granted for all respondents.
5	Nov 1 1993		Brief amicus curiae of International Business Machines Corporation filed. VIDED.
6	Nov 3 1993		Brief of respondent AT&T Company in opposition filed. VIDED.
7	Nov 9 1993		DISTRIBUTED. November 24, 1993 (Page 17)
8	Nov 10 1993	X	Reply brief of petitioner filed.
9	Nov 29 1993		Petition GRANTED. Justice O'Connor OUT.
			**********
16	Jan 7 1994	G	Motion of petitioners to dispense with printing the joint appendix filed.
10	Jan 13 1994		Brief amicus curiae of International Business Machines Corporation filed. VIDED.
11	Jan 13 1994		Brief amici curiae of California Bankers Clearing House Association, et al. filed. VIDED.
12	Jan 13 1994		Brief amici curiae of Wiltel, Inc., et al. filed. VIDED.
13	Jan 13 1994		Brief of petitioner MCI Telecommunications Corporation filed.
14	Jan 13 1994		Brief of respondents Sprint Communications Company, et al. in support of petition filed. VIDED.
15	Jan 13 1994		Brief of the Federal Petitioners filed. VIDED.
18	Jan 18 1994		LODGING by petitioner. 3 copies of Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier.
17	Jan 24 1994		Motion of petitioners to dispense with printing the joint appendix GRANTED. Justice O'Connor OUT.
19	Jan 28 1994	G	Motion of the Solicitor General for divided argument filed.
20	Feb 2 1994		SET FOR ARGUMENT MONDAY, MARCH 21, 1994. (3RD CASE).
21	Feb 9 1994		CIRCULATED.
23	Feb 15 1994		Order extending time to file brief of respondent on the merits until February 18, 1994.
25	Feb 18 1994	X	Brief of respondent AT&T filed. VIDED.
24	Feb 22 1994		Motion of the Solicitor General for divided argument GRANTED. Justice O'Connor OUT.
26	Mar 11 1994	X	Reply brief of petitioners United States, et al. filed.

No. 93-356-CFX

Entry	Date	Note	Proceedings and Orders
			VIDED.
27	Mar 11 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the District of Columbia Circuit.
28	Mar 14 1994	X	Reply brief of petitioner MCI Telecommunications Corporation filed.
29	Mar 15 1994		Record filed.
		*	Certified copy of proceedings before the Federal Communications Commission.
30	Mar 21 1994		ARGUED.

No. 93-356

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
SEP 2 1993
OFFICE OF THE CLERK

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 203(b)(2) of the Communications Act, which authorizes the Federal Communications Commission to "modify any requirement" of Section 203, permits the Commission to make Section 203's tariff-filing requirement optional for telephone companies that lack market power.

RULE 29.1 STATEMENT

MCI Telecommunications Corporation, Inc. is a wholly-owned subsidiary of MCI Communications Corporation. MCI Communications Corporation is a publicly held corporation engaged in a wide variety of telecommunications businesses, including but not limited to national and international voice and data telecommunications services and information services. MCI directly or indirectly owns interests in General Communications Corporation, and AAP Telecommunications Pty. Ltd.

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MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner MCI Telecommunications Corporation ("MCI") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above proceeding on June 4. 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is unreported, and is reprinted at pages 1a to 2a of the appendix to this petition ("Pet. App."). The opinion invalidated a rulemaking order of the Federal Communications Commission. The Commission's rulemaking order is reported at 7 FCC Rcd. 8072 (1992), and is reprinted at pages 3a to 36a of the appendix.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 4, 1993. The jurisdiction of this Court to review the judgment is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 203 of the Communications Act of 1934, 47 U.S.C. § 203, provides, in relevant part:

(a) Filing; public display.

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements.

(1) No change shall be made in the charges, classifications, regulations, or practices which have been

so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates.

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

STATEMENT OF THE CASE

This case involves the power of the FCC to modify tariff-filing requirements under Section 203 of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 203.[1] Section 203(a) requires telephone companies to file tariff schedules with the FCC listing the interstate services they offer and the rates at which those services are offered. Section 203(b)(2) delegates to the Commission the power to "modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions."

Pursuant to Section 203(b)(2), the Federal Communications Commission ("Commission" or "FCC") issued a series of rulemaking orders during the 1980s to make tariff filing optional for certain "nondominant" telephone companies (*i.e.*, those lacking market power). The Commission explained that "traditional tariff regulation of nondominant carriers not only was unnecessary to ensure lawful rates, but actually could be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing."[2] The Commission reaffirmed this "permissive detariffing rule" in a rulemaking order released on November 25, 1993 (*"November 25 Report and Order"*).[3] According to the Commission, permissive detariffing is "one of the cornerstones of . . . regulation of the long distance industry."[4]

The D.C. Circuit, relying on decisions which predated the *November 25 Report and Order* and thus did

[1] In addition to the parties listed in the caption, the following participated in the proceedings below: the United States, the Federal Communications Commission, Ad Hoc Telecommunications Users Committee, US Sprint Communications Company, US WEST Communications Company, Ameritech Operating Companies, International Business Machines Corporation.

[2] 7 FCC Rcd. 8072, 8073 (1992); Pet. App. 3a, 6a.

[3] 7 FCC Rcd. 8072; Pet. App. 3a.

[4] *In re AT&T v. MCI*, 7 FCC Rcd. 807 (1992).

not consider the FCC's views on the meaning of Section 203(b)(2), summarily reversed. Pet. App. 1a. MCI seeks plenary review of that decision.

1. Development of the Permissive Detariffing Rule

Until the 1970's, AT&T's ownership of the vertically-integrated Bell System afforded it a monopoly over interstate telephone service. Competitive challenges to the Bell System began to develop in the 1970's as a result of advances in technology, which reduced the investment required to enter the market, and Commission decisions permitting competition in certain services.

Responding to these changes, the FCC commenced a rulemaking in 1979, called the *Competitive Carrier* proceeding, to consider how regulation should evolve to accommodate the emerging era of competition in the long-distance market. In its *First Report and Order* in 1980, the Commission determined that the tariffing requirements of Section 203 should apply more stringently to dominant carriers (such as AT&T) than to nondominant carriers. Dominant carriers, the Commission concluded, possessed sufficient market power to set unreasonable or discriminatory prices contrary to the goals of the Communications Act, 47 U.S.C. §§ 201, 202, while nondominant carriers could not do so because they were constrained by operation of the market. 85 F.C.C. 2d 1, 20-21 (1980).

In 1981, the Commission proposed that the obligation on certain nondominant carriers to comply with the tariffing requirements of Section 203 be made "permissive," *i.e.*, optional. *Further Notice of Proposed Rulemaking*, 84 F.C.C. 2d 445 (1981). The Commission expressly concluded that its power under Section 203(b) to "modify any requirement . . . of this section" authorized "remov[al] of the requirement of tariff filings where appropriate." 84 F.C.C. 2d at 478-80. The Commission noted that requiring competitive firms without market power to file tariffs "has worked the perverse effect of imposing a measure

which (1) is superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation." 84 F.C.C. 2d at 478-79. After considering comments responding to this notice, the Commission made tariffing optional for certain limited classes of nondominant carriers.[5]

In its *Fourth Report and Order,* the Commission extended the permissive detariffing rules to nondominant facilities-based carriers such as MCI. 95 F.C.C. 2d 554 (1983). The Commission carefully analyzed the relevant product and geographic markets to determine that these carriers lacked market power. 95 F.C.C. 2d at 562-75. It noted that, based upon its three years of reviewing streamlined tariffs from nondominant carriers, "[t]here is no evidence that it is in the public interest for us to continue receiving . . . [these tariff] filings . . . to prevent them from charging unjust or unreasonable rates or making service unavailable." 95 F.C.C. 2d at 578 & n.79. The Commission further noted that "[i]t is costly for carriers to prepare tariff-filings under our rules for dominant carriers . . . [and] these filings can impede entry, impair competitive pricing, and facilitate collusive conduct." *Id.* at 555 n.1. The Commission concluded: "We believe that the purposes of the Communications Act are best satisfied by reduced entry, exit, and pricing barriers and burdens for non-dominant carriers." *Id.* at 579. Neither AT&T nor any other party petitioned for judicial review of the permissive detariffing rule set forth in the *Fourth Report and Order.*

This regulatory change did not produce wholesale abandonment of tariff filings by nondominant carriers. To the

[5] In 1982, the Commission formally adopted the permissive tariffing rules for one group of carriers, domestic resellers of telecommunications services who do not own facilities. *Second Report and Order,* 91 F.C.C. 2d 59 (1982). In 1983, these rules were extended to cover resellers operating on domestic off-shore points. *Third Report and Order,* 48 Fed. Reg. 46,791 (Sept. 28, 1983).

contrary, as the Commission expected, MCI and other nondominant carriers continued to file tariffs for the large majority of their common carrier services.

In 1985, the Commission sought to go beyond the permissive detariffing rules and *forbid* non-dominant carriers from filing tariffs of any sort. *Sixth Report and Order,* 99 F.C.C.2d 1020 (1985). MCI opposed mandatory detariffing as inconsistent with the flexibility the Commission's permissive tariffing rules were intended to promote. Though expensive and somewhat cumbersome, tariffs do provide certain administrative conveniences, such as when a contractual relationship is needed with millions of individual customers.[6] The D.C. Circuit invalidated mandatory detariffing on the ground that it exceeded the scope of the modification power conferred by Section 203(b). *MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186, 1192 (D.C. Cir. 1985). The court expressly declined to consider whether the *permissive* detariffing rule of the *Fourth Report and Order* was within the FCC's delegated authority. *Id.* at 1190 n.4.[7] The panel distinguished permissive detariffing, holding that the FCC "fundamentally altered" that policy when it implemented mandatory detariffing in the *Sixth Report and Order. Id.* at 1190. The D.C. Circuit's decision thus left in place the Commission's permissive detariffing regime.

[6] Prior to the *Fourth Report and Order,* MCI filed tariffs for all its services. Following that decision, MCI continued to file tariffs for most services, but, like AT&T and other carriers, it began to contract with customers for individually negotiated service arrangements. Because it is regulated as a "dominant" carrier by the FCC, AT&T is required to file tariffs covering these negotiated service arrangements after the contracts are signed. *MCI Communications Corporation v. FCC,* 917 F.2d 30, 33 (D.C. Cir. 1990). MCI, like other nondominant carriers relying on the permissive tariffing rule, may or may not have tariffed these negotiated rates.

[7] The panel described its inquiry narrowly: "whether the Commission has statutory authority to prohibit common carriers from filing tariffs." 765 F.2d at 1188.

2. Proceedings Before the Commission

a. *AT&T's Complaint Proceeding*

On August 7, 1989, four years after the D.C. Circuit decision invalidating the *Sixth Report and Order* and almost six years after the *Fourth Report and Order* authorized permissive detariffing for carriers such as MCI, AT&T filed an administrative complaint with the FCC alleging that MCI had violated Section 203 by providing untariffed services to certain large business customers. AT&T sought damages and prospective relief. AT&T made clear that its principal objection was not to permissive detariffing *per se* but to the FCC's refusal to extend it to AT&T.[8] MCI defended on the ground that it had adhered to the unchallenged rules set forth in the *Fourth Report and Order*.

On January 28, 1992, the Commission denied AT&T's damages claim on the ground that it would be "manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability."[9] The FCC dismissed AT&T's claims for prospective invalidation of the permissive detariffing rule. Finding AT&T's claim to be "in practical effect a challenge to the Commission's previously adopted and effective" permissive detariffing rule, the Commission determined that the issue should be decided in a rulemaking proceeding because "the rule represents one of the cornerstones of our regu-

[8] *See* Letter from Francine Berry (AT&T) to Donna Searcy, Secretary, Federal Communications Commission, dated August 7, 1989 ("The Commission's regulatory reforms have not kept pace with the fierce growth of [long distance] competition. Rather than a temporary, transitional measure, the *Competitive Carrier* structure has become a seemingly-permanent imbalance that imposes onerous regulatory requirements uniquely and unfairly on one participant in an intensely competitive market.").

[9] *In re AT&T v. MCI*, 7 FCC Rcd. 807, 809 (1992).

lation of the long-distance industry" and "[a]ny change in this fundamental policy would have a significant impact on a broad range of customers and providers of telecommunications services across the nation."[10] Thus, the Commission's resolution of AT&T's complaint against MCI did not express a view as to the legality of permissive detariffing.

b. *The Rulemaking Proceeding*

On the same day it dismissed AT&T's complaint, the Commission instituted a rulemaking to re-examine the rule in light of AT&T's challenge. *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd. 804 (1992). More than 40 parties, including AT&T, submitted comments in response to the Commission's notice. On November 5, 1992, the Commission announced the results of the rulemaking proceeding, reaffirming the validity of the permissive detariffing rules. On November 25, 1992, the Commission released the text of its formal Report and Order. In this *November 25 Report and Order*, the Commission completed a comprehensive analysis of the importance of the permissive detariffing rule, and of the Commission's authority under the Communications Act of 1934 to promulgate it. *See* Pet. App. 33a.

The Commission addressed Section 203(a), which states that "every carrier" shall file tariffs for common carrier services, but noted that Section 203(b) specifically permits the Commission to "modify any requirement made by or under the authority of this section . . . by general order applicable to special circumstances or conditions." The Commission concluded that "by its terms, Section 203(b) limits the . . . modification power in one circumstance only—the FCC may not expand the 120-day notice period for tariff filings." Pet. App. 43a. The existence of this single, narrow limit on the Commission's

[10] 7 FCC Rcd. at 809.

modification power "strongly suggests that Congress did not otherwise intend to limit that power." *Id.*

The Commission also concluded that Congress was fully aware of the permissive detariffing policy, and repeatedly acquiesced in it. Pet. App. 51a. The Commission explained that Congress' "recent enactment of the TOCSIA [the Telephone Operator Consumer Services Improvement Act of 1990] . . . demonstrated its awareness" of permissive detariffing, and that Congress "made no effort to disturb it." Pet. App. 23a (citing S. Rep. No. 101-439, 101st Cong., 2d Sess. 3 & n.10) (August 30, 1990)). In enacting TOCSIA, Congress specifically legislated to impose tariffing requirements for a subset of services by nondominant carriers—an action that would have been wholly gratuitous had Section 203 been understood as imposing an unwavering tariff requirement. Pet. App. 23a-24a. The Commission also noted that contemporaneous with the consideration of TOCSIA, Congress amended Section 203 itself and left the Commission's permissive detariffing policy undisturbed. *Id.*

The Commission also reviewed the rationale for permissive detariffing, and concluded that reversal of this policy would thwart the purposes of the Communications Act because the policy "played a major role in the rapid development of competition and in the consumer benefits that have resulted." Pet. App. 56a, 59a. The Commission determined that "but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered the competitive fray at all." *Id.* The Commission reaffirmed that, notwithstanding permissive detariffing, it continued to possess ample ability to enforce the reasonableness and antidiscrimination provisions of the Communications Act.

3. The D.C. Circuit's Invalidation of the Permissive Detariffing Rule

While the rulemaking was pending, AT&T petitioned the D.C. Circuit for review of the Commission's decision to dismiss AT&T's complaint against MCI. Both the Commission and MCI argued that the appeals court need not and should not decide the validity of the Commission's permissive detariffing rule, which was being considered in the separate rulemaking proceeding. On November 5, 1992—after oral argument on the appeal but before the panel's decision had issued—the court was informed that the Commission had reaffirmed permissive detariffing and that a formal rulemaking order setting forth the Commission's views would issue shortly. Nevertheless, on November 13, 1992, the court issued an opinion invalidating the permissive detariffing rule.

The panel reversed the Commission's dismissal of AT&T's complaint as "arbitrary and capricious" on the ground that the FCC should have expressly decided the legality of the permissive detariffing rule in AT&T's complaint proceeding, even though the Commission explicitly stated it would resolve that issue in the rulemaking later completed on November 25, 1992. *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); Pet. App. 37a. Instead of remanding, however, the appeals court decided that it would address the issue in the first instance. The panel held that the court's earlier decision invalidating the Commission's *mandatory* detariffing rule, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), "foreclose[d] the Commission's argument in this case":

> We said in *MCI* that the language of section 203(b) "suggest[s] circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement." [765 F.2d at 1190.] To "modify," we thought, suggests to "alter; to change in incidental or subordinate features." *Id.*

> (quoting Black's Law Dictionary 905 (5th ed. 1979)). Whether detariffing is made mandatory, as in the Sixth Report, or simply permissive, as in the Fourth Report, carriers are, in either event, relieved of the obligation to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to "modify" requirements of the Act.

978 F.2d at 736 (footnote omitted); Pet. App. 16a.[11] The court rejected the argument that Section 203(b) empowers the FCC to authorize permissive detariffing, despite conceding that it "was not insubstantial when made initially" in 1985, and that the prior panel in *MCI v. FCC* did not test the argument against the controlling principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 978 F.2d at 735 n.11; Pet. App. 52a.

MCI petitioned for certiorari. Prior to disposition of that petition, AT&T sought D.C. Circuit review of the *November 25th Report and Order*, which had issued in the rulemaking proceeding, and sought summary reversal on the basis of the court's prior opinion in *AT&T v. FCC*. The United States acknowledged that MCI's petition for certiorari raised substantial issues, but argued that review "would be premature unless and until a decision by the court of appeals sets aside those rules on review of the [November 25th] *Rulemaking Order* after full consideration of the Commission's justification." [12] The United States noted that "[t]he Commission has not yet had the opportunity to submit its full justification for the permissive detariffing rules to the court of appeals

[11] In a timely petition for rehearing, MCI sought to bring the *November 25 Report and Order* to the attention of the court, and to encourage the court to reconsider its decision in light of the Commission's later-issued decision. On January 21, 1993, the court denied the petition without comment.

[12] *See* Brief in Opposition for the Federal Respondents, No. 92-1684, at 12.

and to secure an appellate decision that takes account of that justification." [13] Certiorari was denied. 113 S. Ct. 3020 (1993).

On June 4, 1993, the D.C. Circuit summarily reversed the *November 25th Report and Order* on the ground that the prior panel decision in *AT&T v. MCI* "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." Pet. App. 2a. MCI now petitions for certiorari from the D.C. Circuit's ruling.

REASONS FOR GRANTING THE WRIT

Plenary review is necessary because the court of appeals, in disregard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has invalidated an entirely appropriate—and critically important—exercise of the FCC's delegated authority to modify the tariff requirements of Section 203. The importance of the FCC's permissive detariffing rule is beyond dispute. As the United States stated at the certiorari stage in *AT&T v. FCC*, "the court of appeals' rejection of the Commission's permissive detariffing rules is a matter of substantial concern" because "the rules represent a 'cornerstone' of its regulation of the long-distance industry, and their removal is likely to have an adverse and anticompetitive impact on many providers of telecommunications services and their customers." [14]

The decision to invalidate this "cornerstone" of the Commission's regulatory structure conflicts with *Chevron*'s "dominant, well-settled principle of federal law" requiring "judicial deference to reasonable interpretations by an agency of a statute that it administers," and with cases applying *Chevron* in closely analogous circumstances. *Na-*

[13] *Id.*

[14] Brief in Opposition for the Federal Respondents, No. 92-1684, at 11.

tional R.R. Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394, 1401-02 (1992); *see Sullivan v. Everhart*, 494 U.S. 83, 92-93 (1990). This Court has repeatedly granted certiorari to review decisions misapplying *Chevron*—irrespective of any circuit conflict—when the appeals court ruling threatened the foundations of important agency policies. *E.g., National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394 (1992); *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 644 (1990). Plenary review in such circumstances is particularly necessary to ensure that reviewing courts respect "the proper roles of the political and judicial branches" and do not usurp the agency's appropriate policymaking functions on matters of substantial concern. *Pauley v. Bethenergy Mines*, 111 S. Ct. 2524, 2534 (1991).

1. The Commission promulgated its permissive detariffing rule in an exercise of authority expressly delegated by Congress in Section 203. *See November 25 Report and Order*, Pet. App. 13a-14a. Section 203(b)(2) empowers the Commission to "modify any requirement made by or under the authority of this section either in particular circumstances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b). On its face, this language authorizes modification of "any" requirement of Section 203(a), including the "requirement" that carriers file tariffs for all services. The issue, therefore, is whether the Commission's permissive detariffing rule was a proper exercise of its delegated authority to "modify" that requirement.

Resolution of that issue turns on application of the legal standards set forth in *Chevron*. Under *Chevron*, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. Rather, the reviewing court must consider whether "Congress has . . . directly addressed the precise question at issue." 467 U.S. at 842-43. If not, the reviewing court must affirm any reasonable agency interpretation of the statutory provision. *Id.*

When Congress enacted Section 203(b) in 1934, it plainly did not intend to speak to the "precise question" whether Section 203's tariff-filing requirements could be made optional for nondominant long-distance carriers in an emerging competitive market. The 1934 Congress faced a long-distance telephone industry over which AT&T held an unchallenged monopoly.[15] Tariff regulation and other pricing controls of the kind included in the Communications Act, in a regime of close government supervision, were—then as now—a commonly accepted method of regulating monopoly. However, Section 203 contained no express prohibition against modification of the tariff filing requirement for any class of carrier.

What Congress did directly address in 1934 was the need to vest in the Commission versatile authority to tailor its regulatory regime to the evolving circumstances of a complex industry. Congress expressly delegated flexible powers to the Commission *under Section 203* to act in accord with its views of what the public interest requires. The delegation in Section 203(b) is consistent with the overall scheme of the Communications Act, which is, as the Court has recognized, "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). *Cf. NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 128 (1987).[16]

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[15] *See, e.g.*, S.Rep. No. 781, 73d Cong., 2d Sess. 87 (1934).

[16] *See also* 47 U.S.C. § 154(i) (empowering the Commission to "make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); *New England Tel. & Tel. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987) (terming § 154(i) a "necessary and proper clause"), *cert. denied*, 490 U.S. 1039 (1989).

None of the three D.C. Circuit decisions that have resulted in rejection of the FCC's permissive detariffing rule applied these *Chevron* principles to determine whether the Commission's interpretation of its Section 203(b) power to "modify any requirement" of Section 203 encompassed the power to promulgate the permissive tariffing rule. The 1985 decision in *MCI v. FCC* never cited *Chevron*, or considered whether the modification power delegated to the FCC in Section 203(b) justified the permissive detariffing rule under the standards set forth in *Chevron*. The November 1992 decision in *AT&T v. FCC* acknowledged that the prior panel did not address *Chevron*, 978 F.2d at 735 n.11; Pet. App. 52a, but did not undertake the analysis itself. Instead the *AT&T v. FCC* panel held that prior ruling "foreclosed" the interpretation of Section 203 advanced by the Commission—even though, as the court conceded, the FCC's argument "was not insubstantial when made initially," and had not been resolved by the prior panel. 978 F.2d at 735-36; Pet. App. 53a. The appeals court's June 4, 1993 summary decision merely cited to these prior decisions without any analysis.

In the course of reaching this result, the court of appeals applied a rule of statutory construction that conflicts directly with this Court's consistent approach under *Chevron*. Reviewing courts may forego *Chevron* deference to agency interpretations only if the statutory term at issue "cannot bear the interpretation adopted by the [agency]." *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990). Webster's Dictionary alternatively defines "modify" to mean "to make minor changes in" *or* "to make basic or fundamental changes in, often to give a new orientation to or serve a new end." *See* Webster's Ninth New Collegiate Dictionary 763 (1988). The latter definition comfortably encompasses the Commission's permissive detariffing rule.[17]

[17] The FCC did not eliminate the tariffing requirement. AT&T, which accounts for approximately two-thirds of long-distance traffic, must file tariffs. Nondominant carriers continue to file tariffs for the majority of their services.

This Court repeatedly has held that "the existence of alternative dictionary definitions . . . each making some sense under the statute, itself indicates that the statute is open to interpretation." *Boston & Maine Corp.*, 112 S. Ct. at 1402; *accord Sullivan v. Everhart*, 494 U.S. at 91-92.[18] "Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context." *Boston & Maine Corp.*, 112 S. Ct. at 1402. The appeals court's refusal to afford *Chevron* deference in this case thus conflicts directly with the approach set forth in *Boston & Maine Corp.* and *Everhart*. The ordinary meaning of the word "modify" in Section 203(b) is sufficiently ambiguous to require deference to the Commission's reading.

3. Indeed, it is the court of appeals' contrary reading that cannot easily be squared with the text and structure of Section 203. The court of appeals focused on the word "shall" in § 203(a) and termed it the "language of command." 978 F.2d at 735; Pet. App. 53a. But in Section 203(a) the word "shall" is directed entirely at private parties; by its terms, this statutory language does not direct the Commission to do anything. The statutory language directed at the Commission is Section 203(b), which permits modification of the requirement that car-

[18] Indeed, this case is much like *Boston & Maine Corp.*. At issue in that case was the meaning of the word "required" in a statute authorizing condemnation of property "required" for Amtrak's operations. The D.C. Circuit held that the statutory term was unambiguous, and conferred only a narrow condemnation authority in instances where the desired property was "indispensable" to Amtrak's operation. 911 F.2d 743. This Court applied *Chevron* and reversed. The Court acknowledged that "required" would bear the narrow meaning ascribed by the Court of Appeals, but found ambiguity because standard dictionary sources contained far broader definitions. This ambiguity was, as the Court made clear, sufficient to require *Chevron* deference.

riers "shall" file tariffs. Section 203(b)'s express withdrawal of the authority to alter the 120-day requirement provides further support for the Commission's reading. As the Commission found, the existence of this single, narrow limit on the Commission's modification power "strongly suggests that Congress did not otherwise intend to limit that power." Pet. App. 14a. Where, as here, Congress' intent is not manifest, the statutory construction principle *expressio unius est exclusio alterius* indicates that, by limiting the Commission's power in one specific way, Congress intended no other limits. *See Tennessee Valley Authority v. Hill,* 437 U.S. 153, 188 (1978).

Moreover, Section 203(c) makes clear that the 1934 Congress contemplated untariffed service. That provision expressly states that:

> No carrier, *unless otherwise provided by or under authority of this chapter,* shall engage or participate in such communication unless schedules have been filed and published . . .

47 U.S.C. § 203(c) (emphasis added). This provision—which the court of appeals never mentioned in any of the opinions resulting in invalidation of the permissive detariffing rule—expressly addresses the legality of carriers providing service without filing tariffs. It prohibits untariffed service "unless otherwise provided by or under authority of this chapter." That proviso plainly presumes the existence of authority in the Commission to authorize untariffed service. The statutory sequence is further evidence that Section 203(b) delegated far broader authority than the court of appeals presumed; this language in Section 203(c) immediately follows the sentence in Section 203(b) including the key word "modify." The power to "modify" conferred by Section 203(b) thus plainly encompasses the power to authorize untariffed service for specific classes of carriers.

4. Other indicia of congressional intent also strongly support the Commission's interpretation. As the Commission noted in the *November 25 Report and Order,* Pet. App. 22a, Congress has for many years been aware of and acquiesced in the permissive detariffing rule.[19] In 1989, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) to require nondominant carriers servicing pay phones to file tariffs. Such a statutory change would have been redundant had Section 203 already required tariffs for all carriers. The Senate Report on TOCSIA described permissive detariffing in detail as it applied to pay phone services, and explained that the Commission's approach had not been entirely successful. *See* S.Rep. No. 101-439, 101st Cong., 2d Sess. 3 & n.10 (1990) (citing the *Competitive Carrier* proceedings). TOCSIA requires the pay phone companies to file informational tariffs, noting that it does not expect these to be as detailed as those filed by dominant carriers. TOCSIA also expressly permits the Commission to waive this requirement after three years. This regime clearly is premised on the existence, indeed on a baseline, of permissive detariffing—pay phone companies would get no benefit from the waiver if they were required to tariff under Section 203. Furthermore, Congress specifically amended Section 203(b) in 1990. Congress was plainly aware of the Commission's interpretation of that provision at the time of amendment.[20]

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[19] *See, e.g., Long-Distance Competition: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation,* 99th Cong., 1st Sess., 105 (1985) (Statement of Commissioner James H. Quello) (explaining permissive detariffing); *Federal Telecommunications Policy Act of 1986: Hearings on S.2565 Before the Senate Committee on Commerce, Science and Transportation,* 99th Cong., 2d Sess. 89 (1986) (Statement of Commissioner Fowler) (same).

[20] *See FCC and NTIA Authorizations: Hearings Before the Subcommittee on Telecommunications and Finance of the House*

Congress' judgment not to disturb the Commission's interpretation—as well as its recognition of current Commission policy—demonstrate approval of the Commission's interpretation of its modification authority under Section 203(b). *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (Congress' failure to change a scheme when revisited is persuasive evidence); *United States v. Rutherford*, 442 U.S. 544, 554 (1979) ("once an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned" (quotation omitted)).

5. This Court's 1990 decision interperting the tariff requirements of the Interstate Commerce Act ("ICA") in *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), does not require a contrary conclusion.

First, *Maislin* addressed only the power of the Interstate Commerce Commission ("ICC") to excuse a carrier's past violation of the tariff requirements in the ICA.[21] *Maislin* did not consider the power of the ICC to *modify* tariff requirements under the ICA. Neither of the two ICC actions under review in *Maislin* relied upon or even

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Committee on Energy and Commerce, 101st Cong., 1st Sess. 30 (1990) (noting the distinction between dominant and nondominant carriers).

[21] *Maislin* involved an attempt by a carrier's bankruptcy trustee to collect from a shipper the difference between the tariffed rate and the lower rate agreed to by the carrier prior to bankruptcy. The ICC expressly did not modify the tariff requirement, but instead focused on the equitable defenses that a shipper would have to a claim for undercharges, and the ICC's ability to determine "whether the collection of the undercharge in a particular case would constitute an unreasonable practice." *Maislin*, 497 U.S. at 121.

cited Section 10762, which empowers the ICC to modify requirements.[22] In contrast to *Maislin*, the instant case involves the explicit exercise by an agency of power expressly delegated to it by Congress to modify the tariff requirements in a regulatory scheme.[23] Thus, *Maislin* simply does not deal with the issue here.

Second, even if *Maislin* could somehow be construed as having addressed *sub silentio* the modification powers of the ICC under Section 10762(d)(1), the relevant portion of Section 203 of the Communications Act differs in critical respects from its ICA counterpart. As the Second Circuit has observed, Section 203 is in no sense a "carbon copy" of Section 10762. *See American Tel. & Tel. Co. v. FCC*, 503 F.2d 612, 616 (2d Cir. 1974).

Section 10762(d)(1) delegates to the ICC only a limited authority to "change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances." Thus, whereas Congress has plainly delegated to the FCC the broad authority to promulgate "general order[s]" that make fundamental changes in Section 203's regulatory design in order to respond to changes in the regulatory environment, Congress limited the authority of the ICC to grant-

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[22] *See NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C. 2d 99 (1986) ("*Negotiated Rates I*"); *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C. 2d 623 (1989) ("*Negotiated Rates II*").

[23] The only discussion in *Maislin* of the ICC's modification power under § 10762(d)(1) occurred in a single footnote, and related only to the first sentence of § 10762(d)(1) (controlling changes to notice period requirements), and not the second sentence of the section (giving the ICC more general power to modify requirements). *Maislin*, 497 U.S. at 134 n.14. In any event, the Court explicitly declined to address the actions of the ICC under § 10762(d)(1). *See id.* ("We express no view today on the validity of such policies.").

ing case-specific changes in tariff requirements "in particular instances."

Structural differences in the two statutory schemes also indicate that the statutes should be interpreted differently. As the FCC explained in the *November 25th Report and Order*:

> the motor carrier analogues to Sections 203(a) and (c) are contained in separate sections of the ICA—49 U.S.C. §§ 10762(a)(1) and 10761 respectively. The motor carrier analogue to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to the requirements of this section [10762]." Thus, on its face, the ICC's power to modify tariff requirements does not apply to Section 10761(a)'s command (akin to that in Section 203(c)) that motor carriers "shall provide . . . transportation only if the rate for the transportation or service is contained in a tariff. . . ." As set forth above, the modification authority in Section 203(b) applies, by its terms, to both the obligation to file tariffs (Section 203(a)) and the prohibition against untariffed offerings (Section 203(c)).

Pet. App. 47a.

Furthermore, as the Commission explained in the *November 25 Report and Order*:

> the *Maislin* court construed recent statutory changes to the ICA as evidence of Congressional intent to limit any exception authority. Specifically, the Court noted that Congress had amended the ICA to exempt *contract* carriers from the requirements of Section 10761(a), thus "demonstrating that Congress is aware of the [Section 10761(a)] requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers." [quoting *Maislin*, 110 S. Ct. at 2271 (emphasis in original)]. Not only is there a lack of similar corroborating legislative history limiting the FCC's exception authority under Section 203(c), but the legislative history of recent legislation involving the tariff requirements of operator service providers supports the FCC's interpretation of Section 203.

Pet. App. 48a.

6. The appeals court's decision has severely damaged the Commission's public policy objectives in the long-distance market. Even the court of appeals "had no quarrel" with the objectives of the permissive detariffing rule, 978 F.2d at 736; Pet. App. 54a, which has, according to the Commission, "played a substantial role in the development of competition in the interexchange market and the increased choices for customers with respect to carriers and prices."[24] It is one thing for a court to interfere with agency policy and practices that benefit the public interest when Congress has left no other choice, but it is quite another to reach the same result when the statute expressly delegates flexible powers to the regulatory agency to reorient the regulatory regime to serve new ends, and the agency has exercised those powers. Because the text of Section 203(b) plainly delegates sufficient authority to support the Commission's permissive detariffing rule, there is simply no warrant for imposing the anachronistic tariff-filing requirement demanded by the court of appeals.

Indeed, the appeals' court's ruling has broad implications for the Commission's present and future efforts to exercise its power under Section 203(b) to modify tariff filing requirements in response to the evolution of the market for telephone services—both local and long-distance. The Commission has recently invoked its authority under Section 203(b) to promulgate streamlined tariff requirements for nondominant carriers, and AT&T has already indicated that it proposes to challenge the legality

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[24] *In the Matter of Tariff Filing Requirements for Nondominant Common Carriers*, FCC 93-103, February 19, 1993, at ¶ 10.

of those requirements on the authority the interpretation of Section 203(b) contained in *AT&T v. FCC*. The D.C. Circuit's interpretation of Section 203(b) is likely to affect virtually every FCC effort to streamline tariff filing requirements in response to rapid changes in the market for telecommunications services. This is, in sum, a critical juncture. This Court has never spoken on the proper interpretation of Section 203. Clarity as to the scope of the Commission's authority under Section 203(b) is urgently needed.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992

No. 92-1628

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents

INTERNATIONAL BUSINESS MACHINES CORPORATION,
et al.,
Intervenors

And Consolidated Case No. 92-1666

Before: Edwards, Williams and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion for summary decision, the oppositions thereto and the reply, it is

ORDERED that the motion be granted and the order of the Federal Communications Commission (FCC) be summarily reversed. The merits of the parties' positions are so clear as to warrant summary action. *See Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1774

(D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). The decision of this court in *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1988).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CC Docket No. 92-13

IN THE MATTER OF TARIFF FILING REQUIREMENTS FOR INTERSTATE COMMON CARRIERS

REPORT AND ORDER

Adopted: November 5, 1992

Released: November 25, 1992

By the Commission:

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I. INTRODUCTION

1. In a Notice, released January 28, 1992,[1] the Commission initiated this rulemaking to review the lawfulness and future application of the tariff forbearance rules we adopted nearly a decade ago in *Competitive Carrier*.[2] In particular, we sought comment on whether, in light of intervening court decisions and a challenge to those rules by the American Telephone and Telegraph Company (AT&T), the Commission had authority under the Communications Act of 1934 (Communications Act or the Act) "to continue to permit nondominant carriers not to file tariffs."[3] We also sought comment on regulatory alternatives in the event we determined that our existing tariff forbearance rules were unlawful.[4]

2. In response to the *Notice*, we have received and reviewed comments from more than 40 parties represent-

[1] *Tariff Filing Requirements for Interstate Common Carriers* (CC Docket No. 92-13), Notice of Proposed Rulemaking, 7 FCC Rcd 804, 57 Fed. Reg. 6487 (1992) (*Notice*).

[2] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor* (CC Docket No. 79-252) (*Competitive Carrier*), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); First Report and Order, 85 FCC 2d 1 (1980) (*First Report*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (*Competitive Carrier Further Notice*); Second Report and Order, 91 FCC 2d 59 (1982) (*Second Report*), *recon.*, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 46,791 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Fourth Report*); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Fifth Report*), *recon.*, 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Sixth Report*), *rev'd MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (*MCI v. FCC*).

[3] *Notice*, 7 FCC Rcd at 805, para. 8.

[4] *Id.*

ing virtually every segment of the interstate telecommunications industry, including long distance carriers, local exchange carriers, and telecommunications users.[5] On the basis of this record, we now conclude that our existing tariff forbearance rules are lawful and serve the public interest. Accordingly, we reaffirm our decision in *Competitive Carrier* that domestic carriers classified as "nondominant" and subject to forbearance may, but need not, file interstate tariffs. Consequently, we do not address the additional issues raised in the *Notice*, which were conditioned upon a contrary finding.

II. BACKGROUND

A. *The Competitive Carrier Proceeding*

3. Until the 1960s, AT&T, through its then-subsidiary Bell Operating Companies and in coooperation with some 1600 independent local telephone companies, provided virtually all interstate telephone service. Competitive entry into interstate common carriage began on a small scale in 1969, when the Commission authorized Microwave Communications, Inc. (now MCI) to construct and operate microwave circuits between Chicago and St. Louis for the provision of point-to-point common carrier service.[6] Throughout the 1970s, the Commission expanded in increments the categories of services subject to competitive entry.[7] Following the D.C. Circuit's Execunet deci-

[5] A list of the parties participating in this proceeding is attached hereto as Appendix A.

[6] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1968), *recon.*, 21 FCC 2d 190 (1970).

[7] *See, e.g., Specialized Common Carrier Services*, 29 FCC 2d 870 (1971), *recon.*, 31 FCC 2d 1106 (1971), *aff'd Washington Util. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975) ("specialized"/private line services); *Resale and Shared Use of Common Carrier Services*, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978) (*Resale Decision*).

sion,[8] we opened interstate services generally to competition by the end of the decade.[9]

4. The Commission initiated the *Competitive Carrier* proceeding in 1979 to examine the proper scope of regulation in the new era of competition and, in particular, to consider amendment of the tariff filing requirements for competitive telecommunications common carriers.[10] We proposed to apply different rules to different carriers depending upon the extent of their market power. "Dominant" carriers—primarily AT&T and its then-affiliated Bell Operating Companies—would continue to be subject to full tariff regulation.[11] For the new competitive (or "nondominant") carriers, which lacked market power, we proposed a more light-handed approach.[12]

5. The Commission posited in *Competitive Carrier* that nondominant carriers, precisely because they lacked market power, would be unable to charge unjust and unreasonable rates in violation of Section 201(b) of the Communications Act,[13] or to discriminate unreasonably in violation of Section 202(a) of the Act.[14] We tentatively concluded that, in these circumstances, traditional tariff regulation of nondominant carriers not only was unnecessary to ensure lawful rates, but actually could be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing.[15]

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[8] *MCI Telecomm. Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977).

[9] *MTS and WATS Market Structure*, 81 FCC 2d 177 (1980).

[10] *Competitive Carrier Notice*, 77 FCC 2d at 309.

[11] *Id.* at 318-28; *First Report*, 85 FCC 2d at 20-22.

[12] *Competitive Carrier Notice*, 77 FCC 2d at 313-14.

[13] 47 U.S.C. § 201(b).

[14] *Id.* § 202(a); *see Competitive Carrier Notice*, 77 FCC 2d at 334-36.

[15] *Competitive Carrier Notice*, 77 FCC 2d at 313-14, 358-59.

6. As an initial step in the regulatory reform process, we adopted a "streamlined" form of tariff regulation for nondominant carriers, which included reduced notice periods and cost support requirement for tariff filings, and the requirement that parties seeking suspension of such filings overcome a presumption of lawfulness.[16] Concurrently, however, we sought comment on two alternatives to streamlining. Under one option, the Commission would "forbear" from exercising the full range of its Title II regulatory powers, including tariff regulation, while continuing to apply the Act's substantive ratemaking standards contained in Sections 201(b) and 202(a).[17] Under a second, "definitional option," we would find telecommunications providers that lacked market power not to be "common carriers" under the Act,[18] and thus subject to broad deregulation.[19]

7. In the *Second Report*, issued in 1982, we adopted the forbearance option, without ruling on our authority to pursue a definitional approach.[20] Proceeding in a cautious, incremental manner, we applied forbearance first to resale carriers, ordering that such carriers "no longer need adhere to . . . the tariff filing requirements of Section 203."[21] The substantive standards contained in Sections 201(b) and 202(a) thereafter would be enforced against such carriers primarily through the complaint

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[16] *First Report*, 85 FCC 2d at 30-40.

[17] *Competitive Carrier Notice*, 77 FCC 2d at 359-63; *see Competitive Carrier Further Notice*, 84 FCC 2d at 471-91.

[18] *Competitive Carrier Notice*, 77 FCC 2d at 363-68.

[19] *Id.; see Competitive Carrier Further Notice*, 84 FCC 2d at 463-70.

[20] 91 FCC 2d at 61-62 & n.7.

[21] *Id.* at 73.

process under Section 208 of the Act.[22] In 1983, the Commission extended this permissive detariffing treatment to other nondominant carriers, including so-called "specialized carriers" such as MCI and US Sprint,[23] and, a year later, we accorded such treatment to virtually all remaining categories of nondominant carriers.[24]

8. The Commission converted its permissive detariffing rules into a mandatory detariffing requirement for nondominant carriers in 1985.[25] The United States Court of Appeals for the District of Columbia Circuit vacated and remanded that decision, holding that the FCC lacked statutory authority to *prohibit* carriers from filing tariffs.[26] The court, however, explicitly did "not reach the question whether the FCC's earlier permissive orders are invalid," [27] and the permissive detariffing rules have remained a cornerstone of the Commission's regulatory regime since that time.

B. *AT&T's Complaint*

9. On August 7, 1989, AT&T filed a complaint against MCI alleging that MCI was violating Section 203 of the Communications Act by providing interstate telecommunications services to certain large business customers at rates and on terms and conditions not set forth in interstate tariffs.[28] AT&T claimed that, notwithstanding

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[22] 47 U.S.C. § 208; *see Second Report*, 91 FCC 2d at 70-71. We also noted that we could "reimpos[e] . . . the tariff filing requirement" at a later time in the "unlikely event" that the complaint process proved inadequate to that task. *Id.* at 70.

[23] *Fourth Report*, 95 FCC 2d at 578.

[24] *Fifth Report*, 96 FCC 2d at 1191.

[25] *Sixth Report*, 99 FCC 2d at 1020.

[26] *MCI v. FCC*, 765 F.2d at 1192.

[27] *Id.* at 1196.

[28] *See AT&T Communications v. MCI Telecommunications Corp.* (File No. E-89-297), 7 FCC Rcd 807 (1992), *pet. for review pending, AT&T v. FCC*, D.C. Circuit No. 92-1053.

the Commission's permissive detariffing rules, the plain language of Section 203 requires all carriers to file tariffs. In support of this contention, AT&T relied principally upon the D.C. Circuit's 1985 *MCI v. FCC* decision vacating our mandatory detariffing requirement,[29] and on the Supreme Court's subsequent decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,[30] addressing the "filed rate" doctrine under the Interstate Commerce Act (ICA).[31]

10. Recognizing that AT&T's complaint was, in effect, an attack on the legality of the *Competitive Carrier* permissive detariffing rules, with potentially important consequences for the entire telecommunications industry, we concluded that the issues AT&T raised should be addressed in a broader rulemaking proceeding rather than a two-party adjudication.[32] We initiated this rulemaking proceeding for that purpose.[33]

III. THE PLEADINGS

11. Of the more than forty parties that responded to the *Notice*, only six parties, led by AT&T, claim that the Commission was without authority to adopt its permissive detariffing rules.[34] These commenters stress that Section 203 of the Communications Act requires that every common carrier file with the Commission schedules showing all charges for itself and showing the classifications, prac-

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[29] 765 F.2d at 1186.

[30] 110 S.Ct. 2759 (1990).

[31] *See AT&T v. MCI*, 7 FCC Rcd at 808, para. 8.

[32] *AT&T v. MCI*, 7 FCC Rcd at 809, paras. 14-17.

[33] *Notice*, 7 FCC Rcd 804; *see also AT&T v. MCI*, 7 FCC Rcd at 809-10, paras. 17-18.

[34] These parties are AT&T, Alascom, Mobile Marine Radio, NYNEX, US West, and USTA.

tices, and regulations affecting such charges.[35] They claim that the "plain language of Section 203" means that the Commission "has no authority" to relieve any carriers, including nondominant carriers, of the obligation to file tariffs.[36] To bolster this construction, they cite various court decisions interpreting Seciton 203 and similar provisions of the Interstate Commerce Act, upon which the Communications Act provisions are generally patterned.[37]

12. Apart from the allegedly mandatory language of Section 203 itself, opponents of the Commission's current rules also claim that forbearance is inconsistent with the statutory scheme as a whole. In particular, they stress that the filing of tariffs provides the Communications Act's "central protection" against unjust, unreasonable, or unreasonably discriminatory rates and practices, and that the Commission may not dispense with that protection, even in a competitive environment.[38]

13. On the other hand, users, nondominant carriers, enhanced service providers, competitive access providers, some local exchange carriers, and others support our current rules. These parties generally dispute claims that the plain language of Section 203 forbids permissive detariffing. They state that the otherwise mandatory language in Section 203(a) that carriers "shall" file tariffs must be read in light of the equally explicit statement in Section 203(b)(2) that the Commission may "modify any requirement made by or under authority of this section," and the provision in Section 203(c) permitting a carrier to offer service without a tariff when "otherwise provided by or under authority of this Act."[39] These parties contend that this express power to modify the tariff filing requirements gives the FCC ample authority to adopt permissive detariffing.[40]

[35] AT&T Comments at 3; *see also* Alascom comments at 3; NYNEX Comments at 6; US West comments at 4-5; USTA Reply Comments at 2-3.

[36] *See, e.g.*, AT&T Comments at 3; USTA Comments at 2-3.

[37] *See, e.g.*, AT&T Comments at 4-7 (citing *MCI v. FCC*, 765 F.2d at 1186; *Maislin*, 110 S.Ct. at 2759; *Resale Decision*, 572 F.2d at 17); US West Comments at 5-7 (citing, in addition, *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973) (*Special Permission Decision*)).

[38] *See, e.g.*, Mobile Marine Radio Comments at 3-6; USTA Reply Comments at 3-4.

14. Supporters of permissive detariffing also point to repeated instances over the past decade in which Congress has demonstrated its awareness of the Commission's existing rules without attempting to overturn them.[41] They claim, in particular, that the recent enactment of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA),[42] indicates Congressional acquiescence in our interpretation of our forbearance authority.[43] Noting that TOCSIA reimposes limited tariffing requirements on some nondominant carriers—*i.e.*, operator service providers—these commenters contend that the legislation was "clearly founded on a baseline of forbearance for other nondominant carriers' services,"[44] without disturbing that baseline.[45]

[39] *See, e.g.*, Ad Hoc Comments at 7-10; FEMC Comments at 3-6; OCOM Comments at 9-12; MCI Comments at 6-7, 14-18.

[40] *See, e.g.*, Comptel Comments at 2-5, 7-9; MCI Comments at 8-14; CTIA Comments at 11-14.

[41] *See, e.g.*, MCI Comments at 25-45; Comptel Comments at 9-14; Comptel Reply Comments at 6-8.

[42] P.L. 101-435 (codified at 47 U.S.C. § 226 (West Supp. 1990)).

[43] *See, e.g.*, Ad Hoc Comments at 10-13; Comptel Comments at 9-11; FEMC Comments at 8-12; OCOM Comments at 5-7; IBM Comments at 4-6.

[44] *See, e.g.*, Ad Hoc Comments at 12 n.9; *see also* Comptel Comments at 9-12; FEMC Comments at 9-12; OCOM Comments at 5-7; MCI Comments at 34-35; IBM Comments at 5-6.

[45] *See* CTIA Comments at 15-16 (quoting 47 U.S.C. § 226(i) ("Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this Act.")).

IV. DISCUSSION

15. Upon consideration of the record developed in this proceeding and our analysis of the law, we conclude that, in light of the language of Section 203, the Commission may lawfully permit nondominant carriers not to file tariffs. We also find that our conclusion in the *Competitive Carrier* decisions—that permissive detariffing furthers the purposes of the Communications Act and meets the substantive requirements of Sections 201(b) and 202(a), which require that carriers' rates and practices be just, reasonable, and not unreasonably discriminatory—is still valid given the growth and development of the interexchange market.[46] Consequently, we conclude that our forbearance rules that permit nondominant carriers not to file tariffs are both lawful and desirable as serving the public interest.

A. *Permissive Detariffing Is Lawful Under the Communications Act*

1. *The "Plain Language" of the Act Allows Permissive Detariffing*

16. Opponents of the Commission's permissive detariffing rules claim that the plain language of Section 203 requires tariff filings by all carriers and, thus, that the Commission lacks the power to relieve carriers of this requirement, regardless of whether tariffs otherwise serve the broader purposes of the Act.[47] Section 203 of the Communications Act provides, in pertinent part:

> (a) Every common carrier . . . shall, within such reasonable time as the Commission shall designate, file with the Commission . . . schedules showing all charges for itself . . . and showing the classifications,

[46] *See Second Report*, 91 FCC 2d at 71; *Competitive Carrier Further Notice*, 84 FCC 2d at 478-84.

[47] *See, e.g.*, AT&T Comments at 2-3; US West Comments at 6.

> practices, and regulations affecting such charges. . . . (b)(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice specified in paragraph (1) to be more than one hundred and twenty days.
>
> (c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless such schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation, for such communications, or for any service in connection therewith . . . than the charges specified in the schedule then in effect. . . .

17. Although the language of Section 203(a) and 203(c) states that "every" common carrier "shall" file tariffs and "no carrier . . . shall engage or participate in such communication unless schedules have been filed and published . . .," [48] we find that other language within Section 203 limits those commands. Specifically, under Section 203(b)(2) the Commission is granted equally explicit authority to "modify *any requirement*"—save one—"made or under authority of this section." [49] By its terms, Section 203(b)(2) limits the Commission's modification power in one circumstance only—the FCC "may not" expand the 120-day period notice period for tariff filings prescribed in Section 203(b)(1). We believe that this

[48] *See MCI v. FCC*, 765 F.2d at 1191 ("'Shall' . . . is the language of command, [and] . . . [a]bsent a clearly expressed legislative intention to the contrary, courts ordinarily regard such statutory language as conclusive.") (internal quotations omitted).

[49] 47 U.S.C. § 203(b) (emphasis added).

specific, narrow limitation on the Commission's modification power strongly suggests that Congress did not otherwise intend to limit our authority, upon a proper public interest showing, to alter the requirements of Section 203. As we noted in *Competitive Carrier*, "[t]he words 'this section' clearly refer to the entire Section 203. When Congress wished to identify subsections, it used the word 'subsection' or 'paragraph' (followed by the letter or number) throughout the Act. *See, e.g.*, Sections 204, 213." [50] Thus, this modification power may be employed to alter the tariff filing requirements of both subsections (a) and (c) of Section 203.

18. Similarly, Section 203(c)'s prohibition against providing service without a tariff applies "*unless otherwise provided* by or *under authority of this Act.*" [51] In *Competitive Carrier*, we noted that Section 203(b)(2) may be construed as the authority referenced in 203(c).[52] We find no evidence that Congress intended that the Section 203(b) power to modify the requirements prescribed under Sections 203(a) and 203(c) be limited to particular requirements except the requirements explicitly mentioned (the 120-day notice period). We agree with those parties that assert that without specific limitations upon the Commission's authority, Congress intended for the FCC to have broad powers that could be exercised as the public interest requires.[53] Consequently, we find that Section 203 permits the FCC to exercise its authority under Section 203(b) in order to alter the tariff filing requirements of both subsections (a) and (c) of Section 203 as long as the FCC demonstrates that the goals of the Communications Act will be met and that the public

[50] *Competitive Carrier Further Notice*, 84 FCC 2d at 480 n.69.

[51] 47 U.S.C. § 203(c) (emphasis added).

[52] *See* 84 FCC 2d at 481.

[53] *See, e.g.*, IBM Comments at 2; GTE Comments at 12; MCI Comments at 21.

interest would be served thereby.[54] We therefore reaffirm our conclusion in *Competitive Carrier* that these provisions defeat any claim that permissive detariffing is facially inconsistent with Section 203.[55]

19. Nor do the cases cited in support of the "plain language" construction alter our analysis. In *MCI v. FCC*, the court held that our Section 203(b) authority to "modify" tariffing requirements did not permit the Commission to convert the statutory command that carriers "*shall*" file tariffs into a requirement that carriers

[54] Moreover, in the absence of any explicit statutory prohibition, Section 4(i) of the Act, 47 U.S.C. § 154(i), provides additional authority for forbearance. *See, e.g., New England Tele. & Tel. v. FOC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987), *cert. denied*, 109 S.Ct. 1942 (1989) ("section 4(i) is a 'necessary and proper clause' empowering the Commission to 'deal with the unforeseen . . . to the extent necessary to regulate effectively those matters already within the boundaries' ") (*quoting North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985)). It has long been recognized that the FCC, as the expert agency, has ample discretion in this dynamic field of communications. *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); (the Communications Act is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy"); *Bell Telephone of Pennsylvania v. FCC*, 503 F.2d 1250, 1256 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1974). Absent explicit statutory direction, we have well-established discretion in choosing how to regulate, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 138; *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 218-19 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73, 180-81 (1968); *CCIA v. FCC*, 693 F.2d at 212, including the discretion "not to exercise particular authority which . . . has been granted." *NARUC v. FCC*, 533 F.2d 601, 620 n.113 (D.C. Cir. 1976). Because the Commission continues to ensure that the substantive requirements of the Act are met, it is free to exercise its discretion. *Cf. FPC v. Texaco*, 417 U.S. 380 (1974) (indirect regulation of small natural gas producers' rates is permissible so long as the FPC properly applies the Act's substantive standards to those rates).

[55] *Second Report*, 91 FCC 2d at 71; *see Competitive Carrier Further Notice*, 84 FCC 2d at 478-84.

shall not do so. The petitioner in that case was a nondominant carrier that wished to file tariffs and that asserted, among other things, that the Commission's decision to prevent it from doing so would cause it harm.[56] The court stated that in such a context, Section 203(b) did not justify the "wholesale abandonment or elimination" of tariff filings.[57] The court, however, did not—and in light of other precedent permitting tariff forbearance in limited contexts,[58] could not—find the Section 203 facially precluded permissive detariffing. Indeed, the court in *MCI v. FCC* noted that our permissive detariffing rules were "fundamentally" different from those it struck down, and it expressly did "not reach the question whether [those] . . . permissive orders are invalid."[59]

20. Similarly, the Supreme Court's decision in *Maislin* also is not dispositive here.[60] The Court held in that case that the Interstate Commerce Commission (ICC) could not "relieve a shipper of the obligation of paying the filed rate when the shipper and carrier ha[d] privately negotiated a lower rate."[61] That core holding simply re-

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[56] *See MCI v. FCC*, D.C. Circuit No. 85-1030, Brief of MCI, filed April 1, 1985, at 59-60; *id.* Reply Brief of MCI, filed May 15, 1985, at 26-27. In fact, the court in *MCI v. FCC* suggested that the *only* statutory interest properly raised in that case was the interest of the nondominant carrier in being *permitted* to file tariffs. The court noted that "[o]nly when the Commission turned permission into command [in the *Sixth Report*] did MCI's aggrievement become evident and plainly adequate to support a challenge" to the Commission's action. *MCI v. FCC*, 765 F.2d at 1190.

[57] 765 F.2d at 1192.

[58] *See infra* Section IV.A.2.

[59] *MCI v. FCC*, 765 F.2d at 1190, 1196. *See Richman Bros. Records v. U.S. Sprint Communications Co.*, 953 F.2d 1431, 1436 (3rd Cir. 1991) (*MCI v. FCC* did not address lawfulness of permissive detariffing).

[60] *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

[61] 110 S. Ct. at 2762.

affirms the "filed rate doctrine," which courts previously have applied in Communications Act cases as well.[62] By contrast, our forbearance rules allowing permissive detariffing are consistent with that long-established doctrine.[63]

21. Moreover, we note that the specific motor common carrier tariff filing provisions at issue in *Maislin* facially differ in important respects from Section 203 of the Communications Act. In particular, the motor carrier analogues to Sections 203(a) and (c) are contained in separate sections of the ICA—49 U.S.C. §§ 10762(a)(1) and 10761(a), respectively. The motor carrier analog to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to the "requirements of this section [10762]." Thus, on its face, the ICC's power to modify tariff requirements does not apply to Section 10761(a)'s command (akin to that in Section 203(c)) that motor carriers "shall provide . . . transportation only if the rate for the transportation or service is contained in a tariff. . . ." As set forth above, the modification authority contained in Section 203(b) applies, by its terms, to both the obligation to file tariffs (Section 203(a)) and the prohibition against untariffed offerings (Section 203(c)).

22. In addition, although Section 10761(a)'s requirement (like that in Section 203(c) is applicable "[e]xcept as provided in this subtitle," the *Maislin* Court construed recent statutory changes to the ICA as evidence of Congressional intent to limit any exception authority. Specifically, the Court noted that Congress had amended the ICA to exempt *contract* carriers from the require-

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[62] *See, e.g., American Broadcasting Cos. v. FCC*, 643 F.2d 818, 819 (D.C. Cir. 1980).

[63] *See Competitive Carrier Further Notice*, 84 FCC 2d at 483-84; *Certified Collateral Corp. v. Allnet Communications Servs., Inc.*, 2 FCC Rcd 2171, 2174 n.13 (Com. Car. Bur. 1987).

ments of Section 10761(a),[64] thus "demonstrating that Congress is aware of the [Section 10761(a)] requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers." [65] Not only is there a lack of similar corroborating legislative history limiting the FCC's exception authority under Section 203(c), but the legislative history of recent legislation involving the tariff requirements of operator service providers supports the FCC's interpretation of Section 203.[66]

23. Furthermore, we stress that courts have recognized that while there are "similarities" between the Interstate Commerce Act (ICA) and the Communications Act, the FCC should not be "restrict[ed] . . . to a course of action that has been dictated by the requirements of the transportation industry." [67] For instance, in holding that the FCC's authority to modify tariff notice periods was greater than that accorded the ICC under former Section 6(3) of the ICA, the Second Circuit stressed that Section 203 of the Communications Act, in particular, is "not . . . a carbon copy of the Interstate Commerce Act." [68]

24. We also find that the *Special Permission Decision*, in which the Second Circuit stated that Section 203(b) authorized modifications only "as to the form of, and information contained in, tariffs," does not alter our analysis.[69] Not only was such language *dicta*, but like the mandatory detariffing at issue in *MCI v. FCC*, and unlike the permissive detariffing rules at issue here, the "special permission" requirement in that case had the effect of *pro-*

[64] *See* 49 U.S.C. § 10761(b).

[65] 110 S. Ct. at 2771 (emphasis in original).

[66] *See infra* paragraphs 30-34.

[67] *General Telephone Co. of the Southwest v. U.S.*, 449 F.2d 846, 856 (5th Cir. 1971).

[68] *AT&T v. FCC*, 503 F.2d 612, 616, 617 (2d Cir. 1974).

[69] 487 F.2d 865, 879 (2d Cir. 1973).

hibiting AT&T from filing tariffs.[70] The court there explained that there had been "[n]othing in Section 203(b) to justify such procedure . . . [which] was in effect a rate "prescription" and inconsistent with 47 U.S.C. § 205, which authorizes rate prescriptions only after a full hearing and specific findings." [71] Since Section 203(b), by its terms, grants the Commission authority to modify only the requirements of Section 203 itself, the Court understandably found that it did not justify a procedure that conflicted with another section of the Act.

25. Similarly, we do not find the Second Circuit's *Resale Decision* controlling. In that case, the court upheld the Commission's discretion in its administration and interpretation of the Communications Act.[72] While the FCC at that time determined not to forbear completely from Title II regulation of resale carriers, it noted in its order on review that "[l]ater experience may show that the public interest would be served by deregulation of resellers. If so, to the extent that the law allows it, we will review the matter and act accordingly." [73] The Commission has subsequently reconsidered the issue of forbearance in its *Competitive Carrier* decision,[74] and concluded that permissive detariffing, combined with enforcement of Title II substantive standards through the complaint process, was lawful and in the public interest.[75]

[70] *See* 503 F.2d at 617.

[71] *Id.*

[72] *Resale Decision*, 572 F.2d at 25.

[73] *Resale and Shared Use of Common Carrier Service*, 60 FCC 2d 261, 308 (1976).

[74] *See Competitive Carrier Notice*, 77 FCC 2d at 360-61.

[75] *Second Report*, 91 FCC 2d at 70-71, 73. Indeed as the D.C. Circuit held in *Geller v. FCC*, 610 F.2d 973, 978-81 (D.C. Cir. 1979), our "public interest" mandate requires us to reexamine and adjust our regulations—as we did in *Competitive Carrier*—in light of changed circumstances. As stated in the *Fourth Report*, the Commission generally has the "duty to determine that its rules

Particularly because statutes governing administrative action may be susceptible of more than one valid interpretration,[76] the Second Circuit's decision to uphold the Commission's own interpretation of its authority in the different context of the *Resale Decision* provides no support for a facial challenge to our permissive detariffing rules here.

26. Significantly, the opponents' absolutist challenge premised upon the alleged "plain language" of Section 203 proves too much. If there were any merit to their argument, the Commission presumably would be without authority to relieve carriers of the obligations to file tariffs for their interstate common carrier services under *any* circumstances. That clearly is not the case, however. Courts on several occasions have recognized our power to forbear from requiring the filing of federal tariffs for interstate common carrier services in other contexts.

27. For example, in *Diamond International Corp. v. FCC*,[77] the court upheld the Commission's refusal to disturb the charges for certain *intra*state common carrier services that New York Telephone Company had included in its *intra*state, rather than interstate tariff. Although the complaining customer in that case argued that Section 203 of the Communications Act required the disputed charges to be included in interstate tariffs,[78] the

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promote the public interest when applied to particular carriers or applicants, and to refrain from imposing and to remove unnecessary regulatory burdens on carriers." *Fourth Report*, 95 FCC 2d at 580.

[76] *See, e.g., Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1079-90 (D.C. Cir. 1987) (en banc), *cert. denied*, 485 U.S. 913 (1988); *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985).

[77] 627 F.2d 489 (D.C. Cir. 1980).

[78] *Id.* at 490.

court upheld the Commission's decision to defer to state regulation of the service in the absence of any unreasonable burden on interstate communication.[79] Similarly, in *CCIA v. FCC*,[80] the D.C. Circuit upheld the Commission's decision to forbear from all Title II regulation—including tariff regulation—of certain enhanced services and customer premises equipment that otherwise would be subject to such common carrier regulation, where the Commission found that the "difficulty in isolating activities subject to Title II regulation outweighs the benefits to be gained by that regulation." [81] In fact, the court stated: "To the extent that certain enhanced services could lawfully be regulated under Title II once they were identified as common carrier services, we sanction the Commission's forbearance from Title II regulation." [82] We believe that these cases indicate that Section 203 does confer some discretion upon the FCC in determining how to apply that section so that the public interest is served.[83]

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[79] *Id.* at 493. *See also New York Telephone Company v. FCC*, 631 F.2d 1059, 1067 (2d Cir. 1980) (noting that Commission may permit state, rather than federal, tariffing of interstate component of mixed interstate/intrastate service if state regulation does not discriminate against interstate customers).

[80] *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (*CCIA v. FCC*).

[81] *CCIA v. FCC*, 693 F.2d at 211.

[82] *Id.* at 210. We recognize that the Commission asserted, as the primary ground for its decision not to apply Title II regulation to enhanced services and CPE, that the offerings were not "common carrier" services at all. The court explicitly held, however, that the Commission's action was "sustainable on either of the grounds asserted by the Commission." *Id.* at 209.

[83] For other instances in which the Commission declined in its discretion from regulating facilities and services, see our orders cited in the *Second Report*, 91 FCC 2d at 66-67.

2. *Congress has Acquiesced In Permissive Detariffing.*

28. As demonstrated above, we believe that Section 203 can be read to permit the FCC to adopt forbearance rules when the public interest so requires. We recognize, however, the contentions of some of the parties that Congress could not have foreseen the development of nondominant carriers and thus did not address the precise issue.[84] Given that Section 203 was enacted long before a competitive long distance market was even foreseeable, we agree that it is reasonable to conclude that Congress lacked any specific intention regarding the regulatory treatment of nondominant carriers. Section 203 tariff filing requirements were enacted in the context of a monopoly telephone market in order to protect the public from the unlawful rates and practices of the monopoly carrier that exercised unchecked market power. There is no indication that Congress ever considered at the time it enacted Section 203 whether carriers that lacked such market power should also be subject to the full tariff filing requirements of Sections 203(a) and 203(c) if it did not serve the public interest. In tailoring our tariffing policies to the onset of competition in telecommunications, therefore, we have addressed, as we may, circumstances not dealt with directly in the organic statute.[85]

29. Nevertheless, we find that since the time it enacted Section 203, Congress has acquiesced in the FCC's present forbearance rules. We believe these manifestations of legislative intent provide additional support for our conclusion that we have authority to adopt permissible detariffing rules.

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[84] *See, e.g.*, CTIA Comments at 18 n.16; OCCM Comments at 16-17.

[85] *See U.S. v. Southwestern Cable Co.*, 392 U.S. at 172-73; *NARUC v. FCC*, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

30. Most significantly, in its recent enactment of the TOCSIA, Congress has demonstrated its awareness of the Commission's forbearance policy and made no attempt to disturb it.[86] That amendment to the Communications Act requires, *inter alia,* that operator service providers (OSPs), which are common carriers, file "informational tariffs." [87] TOCSIA also authorizes the Commission to waive the filing requirement after four years if it finds that consumers are benefitting from competition to meet statutory objectives.[88]

31. TOCSIA's legislative history makes clear that Congress was aware of the Commission's permissible detariffing rule with respect to nondominant carriers, and that it statutorily modified our authority to forego requiring tariffs for a small subset of common carrier services—involving OSPs—while leaving the existing regulatory baseline intact. First, the committee reports specifically note that many OSPs were considered to be "nondominant" under our *Competitive Carrier* rules and that we had "chosen to 'forbear' " from full Title II regulation of those carriers.[89]

32. Second, the required informational tariffs substantially overlap in scope and purpose the tariff filings provided for in Section 203. Section 226(h)(1)(A) provides that OSPs "shall file . . . an informational tariff specifying rates, terms, and conditions" for operator serv-

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[86] 47 U.S.C. § 226.

[87] *Id.* § 226(h).

[88] *See* 47 U.S.C. § 226(h)(1)(B); 47 U.S.C. §§ 226(d)(1)(A) & (B); S. Rept. No. 101-439, Senate Committee on Commerce, Science, and Transportation, 101st Cong., 2d Sess., at 23 (August 30, 1990).

[89] S. Rept. No. 101-439, Senate Committee on Commerce Science, and Transportation, 101st Cong., 2d Sess., at 3 & n.10 (August 30, 1990); *see also* H. Rept. No. 101-213, House Committee on Energy and Commerce, 101st Cong., 1st Sess., at 3, 5-6 (August 3, 1989).

ices.[90] Congress explained that "[t]his tariff filing requirement is intended to allow members of the public and the FCC to review and, if necessary, investigate these carriers' rates."[91] This informational tariff requirement would be mere surplusage if Congress believed that the FCC had incorrectly interpreted Section 203 as allowing permissive detariffing.[92] In this regard, we find it noteworthy that virtually at the same time Congress enacted TOCSIA, it also amended Section 203 itself.[93] Although Congress was well aware of the Commission's permissive detariffing rules at that time, as evidenced by the contemporaneous TOCSIA legislative history, Congress made no attempt to disturb the Commission's interpretation of its authority under Section 203.

33. Finally, in permitting waiver of the informational tariffing requirement after four years, Congress in effect

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[90] *Cf.* 47 U.S.C. § 203(a) (requiring that tariffs include "charges" and "classifications, practices, and regulations affecting such charges").

[91] S. Rept. No. 101-439, at 23.

[92] Although the informational tariffs required by Section 226(h) must include certain data—*e.g.*, "reasonable estimates of the amount of traffic priced at each rate"—that are not specifically required by Section 203, Congress also made clear that "these informational tariffs are not expected to contain the same detailed cost justification material that typically accompanies the tariffs filed by dominant carriers." S. Rept. 101-439, at 9. *See also* H. Rept. No. 101-213, at 14. Thus, we reject AT&T's contention that the informational tariff filing requirement in Section 226(h) was intended as a *supplemental* requirement (in addition to Section 203 requirements) for OSPs, rather than a substitute for the Section 203 filings that Congress recognized we could excuse. *See* AT&T Reply Comments at 15 & n.*.

[93] *See* Pub. Law 101-396 (approved September 28, 1990) (increasing the notice period (from 90 to 120 days) for tariff filings); *see also* H. Rept. No. 101-316, House Committee on Energy and Commerce, 101st Cong., 1st Sess., at 7-8 (Oct. 27, 1989) (expressing Congress' sentiment that the increased notice period should be used only for local exchange carriers' annual access tariff filings).

recognized and approved the rationale upon which the Commission based its forbearance regime generally. Congress noted that "[i]f the other provisions of this bill have a positive effect in promoting competitive rates and services, . . . the need for these tariff[] filings diminishes."[94] Under these circumstances, we believe that it is fair to assume that Congress has, at the very least, acquiesced in the Commission's construction of its authority to forbear from requiring nondominant carriers to file tariffs under Section 203 of the Communications Act.

34. Therefore, while we recognize that courts may be reluctant to infer Congressional approval of an agency's interpretation of its organic statute based solely upon Congressional inaction,[95] Congress' record over the past decade since we adopted our permissive detariffing rules displays far more than unknowing silence with respect to those rules. Congress has repeatedly acted in the telecommunications area over the past decade that the Commission's policy was in effect and failed to alter or repeal this fundamental policy.[96] Thus, we conclude that the enactment of TOCSIA, which is predicated upon a baseline of forbearance, as well as the failure of Congress to express its reservations about our forbearance rules, supports the interpretation of our authority that we adopted in *Competitive Carrier*.[97]

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[94] S. Rep. No. 101-439, at 23.

[95] *See, e.g., Demarest v. Manspeaker*, 111 S. Ct. 599, 603-04 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Ashton v. Pierce*, 716 F.2d 56, 63 (D.C. Cir. 1983).

[96] *See, e.g.*, H.R. Rep. No. 96-1252, 96th Cong., 2d Sess., pt. 2 at 1 (1980); H.R. 5158, 97th Cong, 2d Sess. (1981) (Telecommunications Act of 1982); H.R. Conf. Rpt. No. 765, 97th Cong., 2d Sess. 56 (1982); FCC Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021 (1989); H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 3 (1989). *See also* MCI Comments at 25-35; CompTel Comments at 9-13.

[97] Courts have often held that where Congress is aware of an agency's interpretation and has not sought to alter it despite mak-

B. *Permissive Detariffing Advances the Purposes of the Communications Act*

35. On the basis of our thorough review of permissive detariffing in the *Competitive Carrier* decisions and the record in this proceeding, we continue to believe that our forbearance policy furthers the statutory purposes of the Communications Act. The fundamental statutory purpose contained in Section 1 of the Act is "to make available . . . to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges. . . ."[98] As the Commission recognized in *Competitive Carrier*, the tariff filing procedures set forth in Section 203 of the Communications Act were designed principally to facilitate enforcement of the substantive requirements, contained in Sections 201(b) and 202(a), that carriers' rates and practices be just, reasonable, and not unreasonably discriminatory.[99] In implementing permissive detariffing, we sought to adapt our regulation of telecommunications common carriers to the changed circumstances of competition and to develop a regulatory approach that furthers the purposes of the Act while fostering innovation and the efficient development of the telecommunications industry.[100] We did not discard the standards of Section 201(b) or 202(a), but rather com-

ing other amendments to the statute, it can be presumed that legislative intent has been correctly discerned. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132, 137 1985); *Bob Jones University v. U.S.*, 461 U.S. 574, 599-602 (1983); *New Haven Board of Educations v. Bell*, 456 U.S. 512, 533-35 (1982); *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965).

[98] 47 U.S.C. § 151; *see Second Report*, 91 FCC 2d at 64.

[99] *Second Report*, 91 FCC 2d at 71; *Competitive Carrier Further Notice*, 84 FCC 2d at 483.

[100] *Second Report*, 91 FCC 2d at 60, 62.

mitted to enforcing them through the complaint process in the event that "irrational carrier conduct or aberrations" occur.[101]

36. In the *Competitive Carrier* decisions, we further concluded the mandatory tariff regulation of nondominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the Act because it inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends.[102] We found that in the case of nondominant carriers, which by definition lack substantial market power, such barriers and burdens impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs. We held that, consequently, the users would pay higher rates and that the services available to meet the needs of users would be limited.[103] Moreover, we additionally held that by allowing permissive detariffing, the risk of collusive pricing would be diminished.[104]

37. We conclude that mandatory tariff filing requirements continue to be unnecessary for nondominant interexchange carriers (IXCs) because they continue to lack market power. If such carriers sought to charge unreasonable rates in violation of Section 201(b) or to discriminate unreasonably in violation of Section 202(a), customers would simply move to other carriers.[105] We agree with those parties stating that the competitive forces in the marketplace serve to ensure, in the first instance, carrier compliance with the obligations imposed by

[101] *Id.* at 70; *see* 47 U.S.C. § 208.

[102] *Second Report*, 91 FCC 2d at 62, 65, 71 *Competitive Carrier Further Notice*, 84 FCC 2d at 453, 456, 471, 479.

[103] *Fourth Report*, 95 FCC 2d at 580.

[104] *Id.* at 556.

[105] *See First Report*, 85 FCC 2d at 31; *Second Report*, 91 FCC 2d at 69.

Sections 201(b) and 202(a).[106] While some commenters argue that the FCC's forbearance policy alters the statutory scheme envisioned by Congress by making it difficult or impossible to ensure that nondominant carriers comply with the Act's substantive requirements that rates be just, reasonable, and not unreasonably discriminatory, we disagree given the competitive evolution of the industry.[107] Further, we note that the complaint process under Section 208 remains available in the event allegations of unjust or unreasonable rates are made.[108] Significantly, we emphasize that if competitive forces fail to ensure carrier compliance with the obligations imposed by Sections 201(b) and 202(a), we will rely not only upon our complaint process but also upon our ability to reimpose tariff-filing requirements as necessary to protect the public from unjust or unreasonable rates charged by carriers operating under permissive detariffing.[109]

38. We also continue to believe that altering our forbearance policy would frustrate the overriding goals of the Act.[110] We agree with those commenters that argue

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[106] *See, e.g.*, RCI Long Distance Comments at 2 (market forces are sufficient to guarantee that rates and practices will be reasonable, because dissatisfied customers can simply and inexpensively pick another carrier); OCOM Comments at 17-18 (the lack of market power by [nondominant carriers] assumes that the public will be afforded the just and reasonable rates required under . . . the Act by ensuring a competitive environment in which pricing is determined by market forces); *see also Second Report*, 91 FCC 2d at 61; *Further Notice*, 84 FCC 2d at 495.

[107] *See, e.g.*, Mobile Marine Radio Comments at 3-6; USTA Reply Comments at 3-4.

[108] 47 U.S.C. § 208. Significantly, under our rules, any party filing a complaint under Section 208 is entitled to discovery in order to ascertain pertinent information regarding carriers' rates and practices. *See* 47 C.F.R. §§ 1.729-1.730 (1992).

[109] *See Fourth Report*, 95 FCC 2d at 579-80.

[110] *See, e.g.*, NTCA Comments at 2-3; GTE Comments at 9-10; *see also Second Report*, 91 FCC 2d at 60-61; *Fourth Report*, 95

that the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers that provide services in a working market.[111] We agree with those parties that assert that the forbearance policy developed in the *Competitive Carrier* decisions has played a major role in the rapid development of competition and in the consumer benefits that have resulted.[112] Moreover, the record here confirms that but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered into the competitive fray at all.[113]

39. We conclude that permissive detariffing has proven to be a success over the years, as evidenced by the robust competition in the interexchange market and the increased choices for customers with respect to carriers and prices.[114]

FCC 2d at 555. We concluded in the *Fourth Report* that applying Section 203(a) requirements to nondominant carriers thwarts the goals of the Act by fostering inefficiencies and imposing costs on carriers and consumers without offsetting benefits to consumers. *Fourth Report*, 95 FCC 2d at 555, 557.

[111] *See, e.g.*, RCI Long Distance Comments at 1-2 (tariff process provides a disincentive for innovation and inhibits price competition); *see also* OCOM Comments at 1-2; TCA Comments at 5.

[112] *See, e.g.*, CompTel Comments at 5-6; AOC Long Distance Comments at 4; Ad Hoc Comments at 3-5; Commonwealth Long Distance Comments at 1-3, 5-6; ICA Comments at 2; OCOM Comments at 1-2; RCI Long Distance Comments at 1-2.

[113] *See. e.g.*,. Interexchange Resellers Association Comments at 1-2; LOCATE Comments at 7-8; TCA Comments at 5-6; RCI Long Distance (new IXCs can enter niche markets for interstate services without costly filings and lengthy regulatory delays); OCOM Comments at 8 (many of the smaller carriers today would not be here now or be able to continue offering competitive services under a more burdensome regulatory structure).

[114] Based upon the past decade of growth and competition in the interexchange market, we disagree with those commenters that contend that the current application of the forbearance doctrine

The decade of actual experience under permissive detariffing provides further confirmation of the success of that approach in furthering the statutory goals of the Communications Act.[115] In 1982, approximately a dozen long distance carriers operated within the United States.[116] By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers.[117] Given this evidence, we believe it is clear that our permissive detariffing rules have allowed for new entrants into the interexchange market and have given consumers more flexibility with respect to the price of service, type of services, and selection of carriers.[118] To adopt a different course of action at this time would only frustrate the success of our current policy.

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creates artificial competition because some but not all participants must file tariffs with cost support. *See, e.g.*, PacTel Comments at 2; NYNEX Comments at 13; Alascom Comments at 4-5.

[115] Indeed, in the *Interexchange Order*, we concluded based upon the extensive record in that proceeding, that competition had flourished under the market analysis set forth in the *Competitive Carrier* decisions. *See Competition* in the Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880, 5881-82 (*Interexchange Order*). *Cf. American Airlines, Inc. v. CAB*, 359 F.2d 624, 633-34 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (1966).

[116] *See Trends in Telephone Service*, Industry Analysis Divison, Common Carrier Bureau, FCC, at 30 & Table 19 (February 1992).

[117] *Summary of Long Distance Carriers*, Industry Analysis Division, FCC, at 6 & Table 1 (June 16, 1992).

[118] While AT&T states that the Commission already has developed streamlined tariffing procedures in the *First Report* that would not overburden nondominant IXCs and that fully complies with Section 203, we believe that the public interest is better served by allowing permissive detariffing of those carriers that lack substantial market power. AT&T Comments at 8. As we stressed in the *Fourth Report*, forbearance "eliminates a potential vehicle for collusive conduct and facilitates price discounting" and, therefore, serves the public interest better than streamlined regulation. *Fourth Report*, 95 FCC 2d at 556 n.3.

40. Moreover, since 1984, overall interstate calling has grown at an annual rate of about 12%, with carriers other than AT&T posting an average annual growth rate in excess of 25%.[119] During the same period between January 1984 and January 1992, AT&T's share in terms of minutes of the interstate market declined from over 80% to just more than 60%,[120] while its rates for directly dialed interstate have also fallen substantially.[121] Several of AT&T's nondominant competitors have engaged in intensive capital investment programs to develop state-of-the-art fiber optic networks, and AT&T now has less than half of the long distance industry's fiber optic route miles.[122] Thus, in light of the successful practical experience with permissive detariffing, we believe not only that this policy advances the broad purposes of the Communications Act and is therefore in the public interest, but also that it would be unreasonable to disturb our current rules in the absence of Congressional or judicial commands.

C. *Additional Matters*

41. In its complaint against MCI that precipitated this rulemaking, AT&T claimed that the permissive detariffing rules we adopted in *Competitive Carrier* were not substantive rules that relieved nondominant carriers of the obligation to file tariffs, but rather an exercise of the Commission's discretion not to enforce the requirements

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[119] *Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau, FCC, at 34 (September 1992).

[120] *Summary of Long Distance Carriers*, Industry Analysis Division, FCC, at 4 & Table 3 (October 1992). With respect to "high end" business services, AT&T's current market share appears closer to 50%. *See Interexchange Order*, 6 FCC Rcd at 5890.

[121] *Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau, FCC, at 13 (February 1992).

[122] *See Competition in the Interstate Interexchange Marketplace*, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2633-34 (1990).

Section 203. In our order resolving that complaint we explained that our permissive detariffing policy was, in fact, a binding substantive rule that removed the tariff filing requirement from nondominant carriers.[123] Having decided here to reaffirm our uncodified forbearance rule, and in order to remove any possible ambiguity on that issue, we codify the permissive detariffing rule.[124]

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

42. *Need and purpose of this action.* This rulemaking proceeding was initiated to review the continuing lawfulness of the Commission's existing permissive detariffing rules in light of a complaint filed by AT&T alleging, in effect, that these rules violate the Communications Act. This order sustains those rules as being consistent with the Act and the public interest.

43. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Act Analysis.* The Initial Regulatory Flexibility Analysis stated that any change in exising rules could have a significant impact on a broad range of telecommunications common carriers. We did not receive any comments that specifically addressed our Initial Regulatory Flexibility Analysis.

44. *Significant alternatives considered and rejected.* The *Notice* did not propose new rules or alternative policies, but sought comment on the lawfulness of our existing permissive detariffing rules and on how they should be changed in the event they are found unlawful. This item reaffirms and codifies our existing rules which minimize regulatory burdens on nondominant carriers.

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[123] *AT&T v. MCI*, 7 FCC Rcd at 809, para. 13.

[124] *See* Appendix B.

VI. ORDERING CLAUSES

45. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4, and 201-05 of the Communications Act of 1934, amended, 47 U.S.C. §§ 151, 154 and 201-05, Part 61 of the Commission's Rules, 47 C.F.R. Part 61, IS AMENDED as set forth in Appendix B.

46. IT IS FURTHER ORDERED, that the policies and rules set forth herein ARE ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

DONNA R. SEARCY
Secretary

APPENDIX A: PARTIES FILING COMMENTS

Comments

ACC Long Distance Corp. (ACC)
Ad Hoc Telecommunications Users Committee (Ad Hoc)
Alascom, Inc. (Alascom)
American Telephone and Telegraph Company (AT&T)
Association for Local Telecomunications Services
Automated Communications, Inc., *et al.*
Cellular Telecommunications Industry Association
Commonwealth Long Distance Company
Communications Transmission, Inc.
Competitive Telecommunications Association
Fairchild Communications Services Company
First Financial Management Corporation (FFMC)
General Communication, Inc.
GTE Service Corporation (GTE)
Interexchange Resellers Association
International Business Machines Corporation (IBM)
International Communications Association (ICA)
KIN Network Access Division
LCI International Worldwide Telecommunications (LCI)
Local Area Telecommunications, Inc.
MCI Telecommunications Corp. (MCI)
Metropolitan Fiber Systems, Inc. (MFS)
Mobile Marine Radio, Inc.
National Telephone Cooperative Association (NTCA)
NYNEX Telephone Companies (NYNEX)
OCOM Corporation (OCOM)
Pacific Telesis Group (PacTel)
RCI Long Distance, Inc. (RCI Long Distance)
Southwestern Bell Corporation
Sprint Communications Company L.P.
Tele-Communications Association (TCA)
Telecommunications Marketing Association
Telocator
US West Communications, Inc. (US West)
Williams Telecommunications Group, Inc.

Reply Comments

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Aeronautical Radio, Inc.
Alascom, Inc. (Alascom)
American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Centel Cellular Corp.
Communications Transmission, Inc.
Competitive Telecommunications Association
Custom Network Services
First Financial Management Corporation (FFMC)
General Communication, Inc.
GTE Service Corporation (GTE)
Information Technology Association of America (ITAA)
International Communications Association (ICA)
LCI International Worldwide Telecommunications (LCI)
Local Area Telecommunications, Inc.
McCaw Cellular Communications
MCI Telecommunications Corp. (MCI)
Metropolitan Fiber Systems, Inc. (MFS)
National Telecommunications and Information Association (NTIA)
NYNEX Telephone Companies (NYNEX)
OCOM Corporation (OCOM)
Southwesten Bell Corporation
Sprint Communications Company L.P.
Telecommunications Marketing Association
Telocator
United States Telephone Association (USTA)
US West Communications, Inc. (US West)
Williams Telecommunications Group, Inc.

APPENDIX B: RULE CHANGES

Part 61 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 61 continues to read:

AUTHORITY: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. § 203.

2. Part 61 is amended by adding Section 61.50 as follows:

§ 61.50 Carriers Subject to Forbearance

Notwithstanding the rules set forth herein, no domestic carrier classified as nondominant that is subject to forbearance is required to file tariffs.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 22, 1992

Decided November 13, 1992

No. 92-1053

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

US SPRINT COMMUNICATIONS COMPANY,
US WEST COMMUNICATIONS, INC.,
AMERITECH OPERATING COMPANIES,
MCI TELECOMMUNICATIONS CORPORATION,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
AD HOC TELECOMMUNICATIONS USERS COMMITTEE,
Intervenors

Petition for Review of an Order of the
Federal Communications Commission

David W. Carpenter, with whom *Peter D. Keisler*, *Francine J. Berry*, and *Mark C. Rosenblum* were on the brief, for petitioner.

John E. Ingle, Deputy Associate General Counsel, Federal Communications Commission, with whom *Robert L. Pettit*, General Counsel, Federal Communications Com-

mission, *Laurence N. Bourne,* Counsel, Federal Communications Commission, *Catherine G. O'Sullivan* and *Robert J. Wiggers,* Attorneys, Department of Justice, were on the brief, for respondents.

Frank W. Krogh, Donald J. Elardo, Loretta J. Garcia, and *Richard M. Singer* were on the brief for intervenor MCI Telecommunications Corporation.

James S. Blaszak and *Patrick J. Whittle* were on the brief for intervenor Ad Hoc Telecommunications Users Committee.

Leon M. Kestenbaum, H. Richard Juhnke, and *Michael B. Fingerhut* entered appearances for intervenor US Sprint Communications Company.

Robert B. McKenna and *Lawrence E. Sarjeant* entered appearances for intervenor US WEST Communications, Inc.

Alfred Winchell Whittaker and *Floyd S. Keene* entered appearances for intervenor Ameritech Operating Companies.

J. Roger Wollenberg, William T. Lake and *Jonathan Jacob Nadler* entered appearances for intervenor International Business Machines Corporation.

Before: WALD, SILBERMAN, and SENTELLE, Circuit Judges.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: AT&T petitions for review of an order of the Federal Communications Commission that concluded an investigation into a complaint filed by AT&T in 1989. The complaint alleged that MCI had violated and was continuing to violate section 203 of the Communications Act, 47 U.S.C. § 203 (1988), by charging some customers rates that were not filed with the FCC. The Commission denied AT&T's complaint in part

and dismissed it in part without determining whether MCI had violated the Act and ostensibly without addressing the validity of the Commission's *Fourth Report and Order,* 95 F.C.C.2d 554 (1983), on which MCI had relied to justify its actions. The FCC said that it would postpone reconsideration of the validity of the *Report* to a rulemaking that it announced at the same time it denied AT&T relief. We hold that it was arbitrary and capricious for the agency to dismiss AT&T's complaint for immediate relief without deciding the question of law it presented. Moreover, we think that in dismissing the complaint the FCC necessarily, if implicitly, assumed the validity of the *Fourth Report* as a substantive rule. And under our precedent the rule is plainly contrary to section 203. We remand to the Commission for it to reconsider the appropriate relief it should grant to AT&T.

I.

Section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1988), requires that every communications common carrier file its rates with the FCC.[1] AT&T's dispute with MCI and the FCC involves "permissive detariffing," a term used to refer to the FCC's decision to forbear from enforcing the rate filing requirement of section 203 against carriers, including MCI, that the FCC determined to be nondominant in the interexchange market (presumably AT&T remains the only "dominant" car-

[1] 47 U.S.C. § 203(a) states: "Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate . . . communication. . . ."

47 U.S.C. 203(b)(2) states:

> The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions. . . .

rier in the FCC's view).[2] Permissive detariffing's genesis is found in the *Competitive Carrier* proceeding the FCC initiated in 1979 to determine methods for reducing the regulatory burdens on communications common carriers. *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking,* 77 F.C.C.2d 308 (1979). In 1982 in its *Second Report and Order,* the Commission decided that it would forbear from enforcing section 203(a)'s filing requirements against nondominant resale carriers. *See Second Report and Order,* 91 F.C.C.2d 59, 71 (1982). And in its 1983 *Fourth Report and Order,* the Commission extended the policy of forbearance (in other words, permissive detariffing treatment) to "specialized carriers" such as MCI. *See Fourth Report and Order,* 95 F.C.C.2d 554, 578 (1983).

The Commission, however, went beyond mere forbearance in 1985 in its *Sixth Report and Order,* 99 F.C.C.2d 1020 (1985), by making detariffing mandatory and by telling non-dominant carriers that it would no longer even accept their rate filings under section 203. For reasons not apparent, MCI, an apparent beneficiary of the *Sixth Report,* challenged that order in this court on the grounds that the FCC had no authority to eliminate a requirement of the Communications Act. *See MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985) (*"MCI v. FCC"*). We vacated the Sixth Report after concluding that it exceeded the Commission's statutory authority. We explicitly did not decide the validity of the earlier *Fourth Report and Order,* but our decision not to do so was predicated on the assumption that the *Fourth Report* was (at least arguably) immune from review

[2] In its *First Report and Order,* 85 F.C.C.2d 1 (1980), the Commission determined that among interexchange telephone carriers, only AT&T exerted market power and was thus dominant. *See id.* at 22-24, 27-30.

under *Heckler v. Chaney,* 470 U.S. 821 (1985), as an exercise of enforcement discretion. *See MCI v. FCC,* 765 F.2d at 1190 n.4.

The Commission, in subsequent litigation, did not help to clarify the nature of the *Fourth Report.* In 1985 the FCC argued that the *Fourth Report* could be "fairly characterized" as an exercise of the agency's enforcement discretion and that it was thus immune from review. Respondent's Brief at 27, *MCI Telecommunications Corp. v. FCC,* 799 F.2d 773 (D.C. Cir. 1984) (No. 84-1402) (Memorandum Order). In the same brief, however, the Commission referred to the *Second* and *Fourth Reports* as rules designed to "exempt" some carriers from the filing requirements of the Act. *Id.* at 29.

In August 1989, with the FCC's characterization of the *Fourth Report* apparently still uncertain, AT&T filed a complaint against MCI under section 208 of the Communications Act. Section 208 allows any person injured by a violation of the Act to file a complaint with the Commission, *see* 47 U.S.C. § 208(a) (1988),[3] and requires the Commission to investigate the complaint and

[3] 47 U.S.C. § 208(a) states:

> Any person, any body politic or municipal organization, or State Commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provision thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. . . . If . . . there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

47 U.S.C. § 206 states:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or

issue an order concluding the inquiry within 12 to 15 months. *See id.* § 208(b). AT&T claimed that since 1987, MCI had been violating, and continued to violate, section 203(a) by charging certain customers special negotiated rates that it had not filed with the FCC. AT&T sought both damages and a cease and desist order. According to AT&T, MCI's actions injured AT&T by putting AT&T at a competitive disadvantage. While AT&T had to file all of its rates with the Commission, MCI did not, thus not only making it more difficult for AT&T to match MCI's rates, *cf. Regular Common Carrier Conference v. United States,* 793 F.2d 376, 379 (D.C. Cir. 1986), but also enabling MCI and other competitors to entangle AT&T in burdensome proceedings before the Commission by filing oppositions to the rates AT&T filed.

MCI, in response, did not deny AT&T's factual allegations. It relied on the *Fourth Report.* According to MCI, the *Fourth Report* was a substantive rule that removed the nondominant carriers' obligation to file all of their rates under section 203(a). AT&T contended, in accordance with our tentative understanding, that the *Fourth Report* had been merely a statement of the FCC's enforcement policy and therefore MCI still had an independent obligation imposed by statute to file all of its rates. If the *Fourth Report* were a substantive rule that purported to remove obligations imposed by the statute, AT&T argued, it was invalid under our *MCI v. FCC* opinion because it exceeded the FCC's statutory authority.

Despite section 208's requirement that the Commission issue an order concluding its investigation into a com-

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declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequences of any such violation of the provisions of this chapter. . . .

plaint within 12 months, *see* 47 U.S.C. § 208(b)(1), AT&T's complaint went unresolved for a good deal longer. The FCC first determined that the complaint raised a broad issue of policy and should be transferred to its policy division. Thereafter, a decision on the complaint was further postponed pending the conclusion of the Commission's rulemaking on *Competition in the Interstate Interexchange Marketplace. See Report and Order,* 6 F.C.C. Rcd. 5880 (1991). Finally, in October 1991, 25 months after the complaint had been filed, AT&T petitioned this court for a *writ of mandamus* ordering the Commission to issue a cease and desist order against MCI. We dismissed the petition in January 1992 when the FCC announced that it would issue an order concluding its investigation by January 30, 1992.

On January 28, 1992, the FCC concluded its inquiry but nevertheless declined to decide forthrightly the issue before it. *See AT&T Communications v. MCI Telecommunications Corp.,* 7 F.C.C. Rcd. 807 (1992). Although the Commission, dispelling prior confusion, determined conclusively that the *Fourth Report and Order* was a substantive rule upon which MCI had properly relied, *see id.* at 809, it purported not to consider whether the *Fourth Report,* so interpreted, was valid under the Communications Act. Instead, the Commission said the *Fourth Report*'s "validity" would be better considered in a rulemaking that would afford all interested parties an opportunity to comment. *Id.* And the Commission announced such a rulemaking on the same day it issued the order concluding the investigation. *See Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking,* 7 F.C.C. Rcd. 804 (1992). The Commission thus asserts that it dismissed AT&T's claim for a cease and desist order without ever determining whether MCI was violating the Communications Act. Nevertheless, the Commission rejected AT&T's claim for damages because it determined that MCI was entitled to rely on the *Fourth Report* as a substantive rule that removed

MCI's obligation to file all its rates. *AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C. Rcd. at 809. The FCC reasoned that even if the rule were declared invalid under the Communications Act, the consequence of that invalidity (whatever it may be) should not apply retroactively to MCI's past conduct. *Id.*

II.

A.

It is rather apparent that, because the Commission fears the *Fourth Report* cannot withstand judicial scrutiny (at least in our court), it wants to avoid judicial review of the rule. This will allow the *Fourth Report* to continue to govern the conduct of carriers for as long as possible. The Commission relies on *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), for the general proposition that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 203 (citation omitted). The maxim of administrative law permits an agency to develop a body of regulatory law and policy either through case-by-case decisionmaking (a quasi-adjudicative process) or through rulemaking (a quasi-legislative process). The Commission claims that it merely exercised a choice between these methods by dismissing AT&T's complaint *without ruling on the merits,*[4] and that it then put on its quasi-legislative hat to reconsider the *Report* in a new rulemaking. The difficulty with the Commission's approach—a sort of administrative law shell game—is that it is a logical *non sequitur* to AT&T's complaint. AT&T's complaint asserts that MCI is acting

[4] Whether it was possible analytically for the FCC to dismiss AT&T's complaint without *implicitly* ruling on the claim is another question. As we discuss below in Part III, we think that by dismissing the complaint the Commission necessarily sanctioned MCI's conduct under the statute.

illegally *under present law*, that MCI has violated the law in the past, and that AT&T is and has been injured by MCI's behavior. AT&T did not, as it can do under the Administrative Procedure Act (APA), request a new rulemaking. *See* 5 U.S.C. § 553(e). When presented with AT&T's complaint, the Commission had an obligation to answer the questions it raised and to decide whether MCI had violated the statute.

The agency's responsibilities as an adjudicator are especially clear under the Communications Act. Section 206-208 of the Act gave AT&T the right to press a claim for damages suffered due to violation of the Act either in federal court or before the Commission. *See* 47 U.S.C. §§ 206-208. The statute thus expressly sets up the Commission as an adjudicator of private rights.[5] The question before the Commission as the adjudicator was whether or not MCI had been, and currently was, violating the law. If it was, at a minimum (putting aside the question of whether AT&T has a right to damages) AT&T was entitled to a cease and desist order at that point. The FCC's proposal to consider the general problem AT&T raises in a future rulemaking—a process designed to consider whether to issue new normative standards—is, when one thinks hard about it, a non-response to the complaint. It is similar to a judge who dismisses a complaint based on a federal statute because he has been informed that Congress is conducting hearings on whether to change the statute. Like the judge, the agency has an obligation to decide the complaint under the law currently applicable. *Cf. Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987), *cert. denied*, 493 U.S. 1019 (1990).

[5] Presumably, AT&T chose to bring its case before the Commission because AT&T is primarily interested in a cease and desist order. The statute does not explicitly grant the district court power to issue such an order, but the parties and intervenors all assume that the Commission could grant such relief.

Agencies do have a fundamental choice whether to interpret and apply federal statutes through adjudication or through rulemaking. But they cannot avoid their responsibilities in an adjudication properly before them by looking to a rulemaking, which operates only prospectively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The choice an agency has between different methods of "making law" is simply irrelevant when the agency is called upon as an adjudicator to apply existing law to a complaint. Here, as in *Meredith*, the Commission "confuses its quasi-judicial role with its quasi-legislative one." *Meredith*, 809 F.2d at 873.

The Commission claims that a two-party adjudication would not have been suitable to consider the validity of the *Fourth Report* because so many carriers in the industry have an interest in the question. We do not think the FCC had any alternative but to confront the issue. However, it easily could have solicited the views of other carriers. The FCC was quite free to invite them to intervene or file briefs as non-parties. *See General Amer. Transp. Corp. v. ICC*, 883 F.2d 1029, 1030 (D.C. Cir. 1989) (Silberman, J., concurring in denial of rehearing). Indeed, nothing stopped the FCC from initiating a companion rulemaking when AT&T filed its complaint—as long as the Commission concluded its inquiry into AT&T's complaint within the 12 to 15 month period required by section 208 of the Act. Nor are we impressed with the FCC's argument that section 208 authorized the Commission's action by giving the agency authority to investigate complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208(a). A future rulemaking that will consider modifying the *Fourth Report* is in no sense an investigation of AT&T's complaint. It could not possibly be, because a rulemaking can affect the conduct of parties only *prospectively*; it does not determine the legality of past conduct. AT&T, it must be understood, challenged MCI's *past* and present actions. A

cease and desist order, to be sure, can be thought to provide prospective *relief*, but it must be based on the premise that existing law has been violated.

The Commission's more interesting argument is that it could not "consider" AT&T's challenge to the legality of the *Fourth Report* because it could not disregard its own rule in an adjudication. *See American Fed'n of Gov't Employees v. FLRA*, 777 F.2d 751 (D.C. Cir. 1985). We have never held, however, that an agency is obliged to apply a rule in an adjudicatory context if intervening events indicate that the rule is unlawful. Our opinion in *Meredith* points in the other direction. There we concluded that the FCC was obliged to entertain petitioner's claim that the FCC's Fairness Doctrine was unconstitutional, whether or not the FCC changed its policy in a new rulemaking. *See Meredith*, 809 F.2d at 873-74. Similarly, then Judge Scalia, concurring in *American Federation of Government Employees*, recognized that in some situations, when an agency declines to apply its own rule in an adjudication "we would be justified [on appeal] in looking beyond the defect of inconsistency, to affirm an adjudication on the ground that its result was mandated by statute and that the conflicting rule was simply unlawful." *American Fed'n of Gov't Employees*, 777 F.2d at 760 (Scalia, J., concurring). Judge Scalia's concern for situations only dimly perceived in that case seems very much on the mark, for otherwise an agency would be required to apply a rule in an adjudication until it had revoked the rule in a new rulemaking, even if the Supreme Court had invalidated the interpretation upon which the rule was based.

In any event, the Commission's stated concern seems to us to be a red herring. If the agency believed its rule was invalid and did not want to so hold in an adjudication, as we mentioned above, it immediately could have started a companion rulemaking to repeal the rule. The agency's

own lawyers could have determined the rule was inconsistent with the statute and a Notice of Proposed Rulemaking would then have so stated.[6] The rule then simply could have been revoked and perhaps a new rule could have been adopted. But surely the agency was not required to apply the invalid rule in the meantime.

Typically, of course, when an agency's rule is challenged in an adjudication as inconsistent with the agency's authorizing statute, the agency rejects the challenge on the merits and the supposed concerns the FCC expresses here are never voiced. The agency applies its rule because it believes the rule is lawful, and the agency is prepared to stand by it forthrightly in a subsequent appeal. The FCC's unusual position here is plainly engendered by a desire to keep the rule in effect as long as possible despite serious doubt that the rule could not withstand judicial review. The Commission thought to achieve this goal by dismissing the complaint, thereby maintaining the legal regime created by the rule. Yet, it sought to do so without squarely relying on the rule to justify the dismissal. In that way, the Commission hoped to avoid judicial review. We have little difficulty in concluding that it was arbitrary and capricious for the Commission to dismiss AT&T's complaint with only a promise to address the legal issue it raised in a future rulemaking. To the extent that the Commission thought it had discretion to postpone decision to a rulemaking, it misunderstood its role as an adjudicator.

B.

The Commission, not surprisingly in light of its obvious strategy, insists that even if we conclude, as we do, that the agency's dismissal of AT&T's complaint violated the law, we should not reach the validity of the *Fourth Report*. According to the Commission, the order below did

[6] Here, of course, the agency also had the benefit of the parties' briefs.

not apply the *Fourth Report* or consider its validity and, indeed, did not even determine the lawfulness of MCI's conduct. Thus, we are told we must remand the case to the agency, so that the Commission can determine the validity of the rule in the adjudication.

We are quite aware that to accept the Commission's argument would be to allow the FCC's troubling tactics largely to succeed. The FCC, it will be recalled, did not decide AT&T's complaint within the statutory time period. It was only after AT&T brought a *mandamus* petition before us 25 months after the complaint had been filed that the FCC agreed to issue its decision. To remand the case now for the FCC to "consider" the validity of the *Fourth Report* would simply permit the FCC to delay the process further. Moreover, a remand seems especially unnecessary in light of our prior opinion in *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), which, as we discuss below, virtually settles the issue in this court.

Still, we need not rely on these factors to conclude that the *Fourth Report* is properly before us. It is well established that a rule may be reviewed when it is applied in an adjudication—an agency need not explicitly reassess the validity of a rule to subject the rule to challenge on review. *See NLRB Union v. FLRA*, 834 F.2d 191, 195 (D.C. Cir. 1987); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).[7] Despite the Commission's protestations to

[7] A simple citation to these cases also suffices to dispense with the FCC's claim that AT&T's challenge to the *Fourth Report* was not timely because it was not filed when the *Report* was first issued. The FCC's argument that the complaint was not timely seems particularly meritless in this case because it was not until the FCC issued the very order under review here that it was clear that the *Fourth Report* was a substantive rule that altered carriers' obligations under the statute. In any event, the contention that AT&T's challenge was not timely, or, as the Commission now

the contrary, we think the Commission necessarily relied on the *Fourth Report* in its decision to dismiss AT&T's complaint.

The *Report*, and the Commission's desire to protect it, clearly provided the underlying rationale for the order under review. The Commission explicitly justified its decision to dismiss on the grounds that the complaint challenged "the Commission's previously adopted and effective forbearance rule." *AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C. Rcd. 801, 809 (1992). And, in denying AT&T retrospective relief, the Commission relied on its conclusion that the *Fourth Report* was a substantive rule that removed the obligation of carriers to file tariffs. *Id.* The FCC's only reason for clarifying its review of the *Report* was to provide MCI and other carriers with a regulatory sanction for their behavior. As the Commission concluded: "It would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, *which the Commission explicitly approved in advance*, may give rise to a finding of liability." *Id.* (emphasis added).

Whatever tortured language the Commission used to describe its actions,[8] the decision to dismiss AT&T's com-

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argues, that it is barred by the doctrine of laches, cannot justify the Commission's decision since neither reason was cited by the Commission in its original order. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

[8] The Commission claimed that it could dispose of AT&T's claim for "prospective relief" (a cease and desist order) because, although "nominally stated in terms of a request for relief against MCI, [it] is in practical effect a challenge to the Commission's previously adopted and effective forbearance rule." *See AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C. Rcd. 807, 809 (1992). That is, of course, true, but it hardly justifies the Commission's ostensible refusal to consider the validity of the rule. Whether the relief to be considered is damages or a cease and desist order, the question before the Commission is whether MCI has been and is violating the law.

plaint necessarily must have rested on the *Fourth Report* and placed an implicit imprimatur on the *Fourth Report*'s interpretation of the statute. The notion the FCC advances before us—that it did not apply the *Report* and did not determine whether or not MCI had violated the statute—suggests that its order merely left the parties in legal limbo. But the Commission ignores the practical effect of its order. In dismissing the complaint, the Commission rejected AT&T's request for relief and definitively sanctioned MCI's conduct. There is no conceivable basis for the agency's action other than a temporary reliance on the *Fourth Report's interpretation of the statute* as a valid statement of the law, at least for the interim period between the time of the dismissal and the conclusion of the new rulemaking. Notwithstanding its claims for discretion to proceed either by rulemaking or by adjudication, the Commission does not, and could not, claim that pending a new rulemaking it has authority to decide complaints contrary to the law. Once the Commission's necessary reasoning is recognized, the Commission's sophistic claim that it did not apply the *Report* or pass on its validity evaporates.

Finally, we see no need to remand to obtain an agency interpretation of the statute.[9] The Commission, of course, set forth its statutory construction when it promulgated the rule. When a rule is challenged in its application, courts typically examine the validity of the rule on the basis of the reasoning offered when the rule was originally promulgated. *See, e.g., National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 607 F.2d 392, 425 n.59 (D.C. Cir. 1979), *cert. denied*, 444 U.S 1025 (1980); *Network Project v. FCC*, 511 F.2d 786, 789 n.1 (D.C. Cir. 1975). And, in any event, the agency has already defended (unsuccessfully) in *MCI v. FCC* the very statutory interpretation that underpins the *Fourth Report*. Accordingly, we pass on to the merits.

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[9] We would normally be obliged to follow this course if the statutory language were ambiguous.

III.

It is unnecessary to consider any more whether the *Fourth Report* is merely an enforcement policy. The Commission has determined unequivocally that it is a substantive rule [10] designed to affect not only the FCC's enforcement policies, but also the relationships and rights of the "dominant" carrier, AT&T, and all other carriers. As a substantive rule, the *Fourth Report* is simply not defensible in this court. Its validity hinges on the interpretation of section 203 of the Communications Act. Section 203(a) states that "every" carrier "shall" file its tariffs with the Commission. 47 U.S.C. § 203(a). We said in *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), "Shall . . . is the language of command." *Id.* at 1191 (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)). The Commission points out (as it did in *MCI*) that section 203(b) allows the Commission to "modify any requirement" of the section "in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b)(2). According to the FCC, that language allows the Commission to remove the filing obligation from certain carriers as long as it continues to enforce the substantive requirements of sections 201 and 202—namely that rates be just, reasonable, and nondiscriminatory. *See* 47 U.S.C. §§ 201-202. Although the argument was not insubstantial when made initially, we concluded that the language of the statute was not susceptible to the Commission's reading.[11]

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[10] The language of the *Report* amply justifies the Commission's reading. The *Report* begins by proposing "to remove . . . regulatory requirements for non-dominant carriers," *Fourth Report and Order*, 95 F.C.C.2d 554, 555 (1983), and concludes by giving carriers, subject to the order, "permission to cancel their tariffs on file with this Commission," *id.* at 582.

[11] Our opinion, although it does not cite *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), postdates that case.

In *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), as noted above, we concluded that section 203(b) could not be interpreted to permit the Commission's attempt to *require* nondominant carriers to stop filing tariffs under section 203(a). We struck down the mandatory detariffing rule contained in the Commission's *Sixth Report and Order*. *See MCI*, 765 F.2d at 1195-96. To be sure, we explicitly reserved holding on the permissive detariffing scheme of the *Fourth Report*, but only because we believed the *Report* "arguably immune from judicial review" as a simple statement of enforcement policy. *Id.* at 1190 n.4. Our reasoning in *MCI* forecloses the Commission's argument in this case. We said in *MCI* that the language of section 203(b) "suggest[s] circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement." *Id.* at 1192. To "modify," we thought, suggests to "alter; to change in incidental or subordinate features." *Id.* (quoting BLACK'S LAW DICTIONARY 905 (5th ed. 1979)). Whether detariffing is made mandatory, as in the *Sixth Report*, or simply permissive, as in the *Fourth Report*, carriers are, in either event, relieved of the obligations to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to "modify" requirements of the Act.[12]

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[12] As we discussed in *MCI*, the Second Circuit's interpretation of section 203(b) is similarly restricted. *See id.* at 1192 (citing *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); and *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865 (2d Cir. 1973)).

As AT&T points out, our opinion in *MCI* is somewhat buttressed by the more recent Supreme Court case, *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). There, the Court rejected the ICC's "deregulatory" interpretation of the quite similar rate-filing provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10761-10762 (1988), which share a common ancestor with the Communications Act, the original Interstate Commerce Act. Due to

We understand fully why the Commission wants the flexibility to apply the tariff provisions of the Communications Act to AT&T, which the Commission regards as the dominant carrier, differently from the way it applies the tariff provision to other competing carriers. We do not quarrel with the Commission's policy objectives. But the statute, as we have interpreted it, is not open to the Commission's construction. The Commission will have to obtain congressional sanction for its desired policy course.

IV.

There remains AT&T's claim for damages. The Commission, as part of its strategy to avoid judicial review of the *Fourth Report*, disposed of this claim by concluding that, assuming, *arguendo*, the *Fourth Report* was contrary to law, AT&T would still not be entitled to damages because any such determination of law should not be applied "retroactively." In other words, *MCI* was entitled to rely on the Commission's interpretation of the

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this shared lineage, an interpretation of one of the modern statutes is often thought instructive in judicial construction of the other. *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990); *American Broadcasting Cos. v. FCC*, 643 F.2d 818, 820-21 (D.C. Cir. 1980); *AT&T v. FCC*, 487 F.2d at 873-74. In *Maislin*, a carrier had negotiated a rate with a shipper that was below the carrier's filed rate. When the carrier tried to collect the filed rate rather than the negotiated rate, the ICC, under its Negotiated Rate Policy, rejected the carrier's claim. The Supreme Court, however, disapproved the ICC's interpretation of the Act. "[B]y sanctioning adherence to unfiled rates," the Court said, the ICC had "undermine[d] the basic structure of the Act." *Maislin*, 497 U.S. at 132. The Court concluded that compliance with the filing requirements was " 'utterly central' to the administration of the Act," *id.* (quoting *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986)) and that the obligation to charge only filed rates had "always been considered essential to preventing price discrimination," *id.* at 126. Despite the harsh result for a shipper who had negotiated a lower rate, the Court thought the ICC must adhere to the "filed rate doctrine" that requires carriers to charge, and shippers to pay, *only* the rate filed with the ICC.

statute embodied in the *Fourth Report*. The Commission applied the five factor test we have used to determine whether new law developed by an agency in adjudication should be applied retroactively, *see Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *see also Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 913 (1988), and decided the answer to the hypothetical question in this case was no. AT&T claims that, in light of our *MCI* decision, an explicit Commission recognition that its *Fourth Report* is *ultra vires* is no real change in the law.

We do not think it appropriate to resolve this dispute and apply the five factor test at this stage because we do not fully understand what the Commission sees as "the law" to be applied retroactively. By implication, the Commission must be referring to a prospective change in its regulation, but we think it is analytically incoherent to consider whether that change should be applied retroactively until it is fashioned. If the Commission means, instead, only its acceptance of our *MCI* interpretation, it would have to explain why that is a change in the law. The Commission may be relying on its right to refuse to acquiesce in one (or more) court of appeals' interpretation of its statute, but, then, how does it explain the interrelationship between a party's possible cause of action in the district court and one before the Commission? Would parties be entitled to damages in the United States District Court for the District of Columbia (particularly in light of our *MCI* opinion), but not before the Commission?

* * * *

We remand the case to the Commission, having vacated the *Fourth Report* as contrary to the Communications Act, with instructions to reconsider AT&T's claim for relief. It would appear that AT&T is entitled promptly to a cease and desist order against MCI. We do not direct the Commission to provide specific relief,

however, partly out of a reluctance to direct an agency as to the exact remedy to be employed and partly because of our expectation that the practices sanctioned by the *Fourth Report* will cease since carriers who do not file tariffs will be subject to damage suits in our district court. The Commission will also have to reconsider AT&T's damages claim. If the Commission continues to believe that retroactivity is an obstacle to recovery of damages, it must explain what it understands to be the applicable law and why that law constitutes a change that implicates retroactivity concerns.

It is so ordered.

APPENDIX D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. E-89-297

IN THE MATTER OF AT&T COMMUNICATIONS,
Complainant,
v.

MCI TELECOMMUNICATIONS CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1992 Released: January 28, 1992
By the Commission:

I. INTRODUCTION

1. On August 7, 1989, AT&T Communications filed the above-captioned formal complaint with this Commission pursuant to sections 206 and 208 of the Communications Act [1] and Sections 1.721 *et seq.* of the Commission's Rules.[2] AT&T alleges that MCI Telecommunications Corporation provides common carrier telecommunications services to several customers at rates, and on terms and conditions, that are not filed or contained in interstate tariffs, in violation of section 203 of the Communications Act.[3]

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[1] 47 U.S.C. §§ 206 and 208.

[2] 47 C.F.R. § 1.721 *et seq.*

[3] 47 U.S.C. § 203. Section 203(a) provides that "[e]very common carrier . . . shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open

2. Pursuant to our authority under section 208 of the Act, we deny AT&T's complaint in part and dismiss it in part. It would be manifestly unfair to impose liability on MCI for past conduct which the Commission has explicitly authorized. Moreover, the complaint calls into question the prospective lawfulness of longstanding rules that play a fundamental role in our regulation of the interstate marketplace. Any decision relative to those rules could have a profound effect on a broad range of consumers and providers of telecommunications services. This decision should not be made in an adjudicatory proceeding between two parties.

3. The proper procedural vehicle for considering changes in our forbearance rule is a rulemaking proceeding. In a companion order adopted today, we institute such a proceeding so that the issues raised by AT&T may be addressed in an appropriate manner.[4]

II. BACKGROUND

4. In 1979, the Commission initiated the *Competitive Carrier* rulemaking proceeding in order to consider amendment of the tariff filing requirements for competitive common carriers, as well as other rule changes relating to facilities and services authorizations.[5] In the *Sec-*

for public inspection, schedules showing all charges for itself . . . and showing the classifications, practices and regulations affecting such charges." Section 203(c) provides that "[n]o carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act . . . and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith. . . ."

[4] *See* Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 92-13, FCC 92-35, adopted January 24, 1992.

[5] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308, 309 (1979).

ond Report and Order, adopted in 1982, the Commission concluded that nondominant telecommunications common carriers—defined as those carriers without market power—lacked both the incentive and ability rationally to charge rates that would violate the Communications Act's substantive requirements that rates be just and reasonable and not unreasonably discriminatory.[6] For such carriers, the Commission concluded that tariff filing requirements tended to "inhibi[t] price competition, service innovation and the ability of firms to respond quickly to market trends," [7] and therefore were inconsistent with the Act's broader mandate "to make available . . . to all people of the United States a rapid, efficient Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." [8] Accordingly, the Commission adopted its previous tentative conclusion that, in these circumstances, section 203 of the Act did not mandate the filing of tariffs by nondominant carriers.[9]

5. Taking a cautious, incremental approach, the Commission limited the scope of the initial forbearance rule

[6] *See* 47 U.S.C. §§ 201(b), 202(a).

[7] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order, 91 F.C.C.2d 59, 65 (1982).

[8] *Id.* at 64, *quoting*, 47 U.S.C. § 151.

[9] *Id.* at 71, *citing*, Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, 479, 484 (1981). The Commission concluded that the statute's substantive standards could be enforced most effectively against nondominant carriers through the complaint procedures specified in section 208 of the Act, rather than through tariff investigations. Second Report and Order, 91 F.C.C.2d at 70-71. As we state in note 26, *infra*, we do not consider AT&T's complaint an attempt to enforce the substantive provisions of the statute. AT&T, in this case, is using the complaint process in order to attempt to change a long-standing Commission rule.

to resale carriers, ordering that such carriers "no longer need adhere to . . . the tariff filing requirements of section 203," although they were free to continue to file tariffs if they so chose.[10] One year later, in the *Fourth Report and Order,* the Commission extended forbearance to all nondominant interexchange carriers (IXCs) including so-called "specialized carriers" such as MCI.[11]

6. Neither AT&T nor any other participant in the *Competitive Carrier* proceeding sought judicial review of the Commission's decision to forbear from tariff regulation of nondominant carriers. The Commission to date has not reconsidered those policies and rules, and no court has reviewed them.[12] Today there are in excess of four hundred nondominant IXCs that offer common carrier services.[13] Few, if any, of these carriers file tariffs

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[10] *Id.*, at 73.

[11] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95 F.C.C.2d 554 (1983). The Commission also expanded the class of nondominant IXCs to include miscellaneous common carriers, domestic satellite carriers (domsats), domsat resellers, domestic operations of Western Union, international record carriers, other record carriers, and interexchange carriers affiliated with exchange telephone companies. *Id.* 95 F.C.C.2d at 557.

[12] Later in the *Competitive Carrier* proceeding, the Commission adopted rules which compelled nondominant carriers to cancel their existing tariffs and prohibited failure tariff filings. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Sixth Report and Order, 99 F.C.C.2d 1020 (1985). Mandatory forbearance, as it was called, was overturned after judicial review. *See MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985) (hereinafter *"MCI v. FCC"*). The court in that case, however, explicitly "d[id] not reach the question whether the FCC's earlier permissive orders are invalid." *Id.* at 1190-1191, n.4.

[13] Summary of Long Distance Carriers, Industry Analysis Division, FCC, November 22, 1991, Table 1.

for all their service offerings, and most do not file any tariffs at all.

A. *The Complaint*

7. AT&T's complaint alleges that MCI provides interstate telecommunications services to large business customers, at rates and on terms and conditions that are not filed or contained in MCI tariffs.[14] According to AT&T, MCI's actions violate section 203 of the Communications Act.

8. AT&T argues that MCI is not relieved of its obligation to file tariffs by its classification as a nondominant carrier under the Commission's *Competitive Carrier* rules. In support of its position, AT&T cites *MCI v. FCC,* which, it claims, held that the tariffing provisions of Section 203 are mandatory, and may not be lifted as to any carrier.[15] AT&T also cites a 1990 Supreme Court decision, *Maislin Industries, U.S., Inc. v. Primary Steel Inc.,* which AT&T claims, confirms that MCI's conduct violates section 203.[16]

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[14] Specifically, AT&T alleges that MCI provides off-tariff service to Merrill Lynch, the Westin Hotel Company, United Airlines, the Department of Defense, the University of Colorado at Boulder, and Uniguard Security Insurance Program. AT&T Complaint at 7-10.

[15] AT&T Complaint at 3, *citing, MCI v. AT&T,* 765 F.2d at 1188, 1192-93.

[16] Motion of American Telephone and Telegraph Company for Summary Decision at 7-11, *citing Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* —— U.S. ——, 110 S.Ct. 2759 (1990) (hereinafter "Maislin"). In March 1990, we initiated a comprehensive examination of the state of competition in the long-distance marketplace with a view toward relaxing some of our regulatory controls over AT&T. Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd. 2627 (1990). Pending completion of this proceeding, we deferred consideration of AT&T's complaint. The Commission recently adopted rules in that proceeding. Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd. 5880 (1991), *recon. pending.*

B. *MCI's Response*

9. MCI admits that it has provided service to the six named customers other than by tariff [17] but argues that AT&T has failed to establish a *prima facie* case against MCI. MCI claims that it has, at all times, abided by the Commission's *Competitive Carrier* rules and that its actions therefore fully complied with the Communications Act as interpreted and applied by the Commission.[18] MCI argues that *MCI v. AT&T* is inapposite to AT&T's complaint since that case only decided that mandatory forbearance was unlawful.[19] Likewise, MCI argues that, since *Maislin* involved a different agency under a different statute involving different factual circumstances, that case has no bearing on the non-tariff arrangements that MCI and other nondominant IXCs have entered into with customers.[20]

10. MCI also argues that AT&T's complaint is fundamentally a petition for reconsideration of the Commission's *Competitive Carrier* rules. It claims that, as such, the complaint is untimely in violation of Section 405 of the Act and Section 1.106(f) of the Commission's Rules.[21]

11. Finally, MCI argues that AT&T's complaint is not the proper vehicle for modifying the *Competitive Carrier* rules. It states that if the Commission were to decide within the context of the complaint that MCI's failure to tariff its service to some customers is a violation of Sec-

[17] MCI's Opposition To Motion To Compel at 2.

[18] MCI's Motion to Dismiss at 1-3, 7-9.

[19] MCI's Motion to Dismiss at 6-7, 16-18.

[20] MCI's Opposition to Motion of American Telephone and Telegraph Company for Summary Decision at 4-5.

[21] Section 405 of the Act and Section 1.106(f) of the Commission's Rules establish a 30-day deadline for filing requests for reconsideration of Commission orders. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

tion 203 of the Act, the Commission would be modifying *Competitive Carrier* without benefit of an appropriate rulemaking. It argues that any reassessment of those policies and rules should involve all parties who are potentially affected by such reassessment.[22]

III. DISCUSSION

12. We now deny AT&T's complaint in part and dismiss it in part.[23] We deny AT&T's complaint insofar as it seeks damages against MCI for its past conduct in offering service at rates and on terms and conditions not contained in tariffs filed with the Commission. That claim directly conflicts with the duly adopted "forbearance" rule upon which MCI was entitled to rely. We dismiss AT&T's complaint insofar as it seeks injunctive relief requiring MCI to file tariffs in the future. AT&T seeks, in effect, the wholesale repeal of that rule, which has governed interexchange competition for the better part of a decade. We find such broad relief to be inappropriate in the context of this adjudicatory proceeding between only two of the industry's numerous participants. By companion order adopted today, we initiate a rulemaking proceeding to reexamine our forbearance rule.[24]

13. We deny AT&T's complaint insofar as it claims that MCI is liable for damages because its practice of providing service off-tariff violates section 203 of the Act. MCI's conduct, in this regard, at all times complied with what the Commission, in the *Fourth Report and Order*, has said MCI may do, *i.e.*, provide interstate telecommunications service at rates and on terms that are not

[22] MCI's Motion to Dismiss at 13-15.

[23] We note that section 208(a) of the Communications Act requires the Commission to investigate complaints "in such manner and by such means as it shall deem appropriate."

[24] *See* note 4, *supra*.

contained in tariffs on file with the Commission.[25] Contrary to AT&T's claim that the forbearance policy reflects merely an exercise of the Commission's prosecutorial discretion, the *Fourth Report and Order* adopted a binding substantive rule that removed the requirement that nondominant carriers such as MCI file tariffs. Under those circumstances, it would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability.[26] Any off-tariff service offerings by MCI have been made pursuant to rules promulgated by the FCC in orders that were not challenged on review and have long since become final. We will not award damages against MCI based simply on allegations made years later that the rules to which MCI conformed its conduct are beyond our authority to adopt.

14. We also dismiss AT&T's complaint insofar as it seeks prospective relief enjoining MCI from providing off-tariff services. This claim, while nominally stated in terms

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[25] While AT&T asked the Commission in its complaint to investigate whether MCI had violated sections 201(b) and 202(a) of the Communications Act, *see* AT&T Complaint at 12-13, it appears to have disavowed this request and limited its complaint to alleged violations of section 203 of the Act. *See* AT&T Petition for Writ of Mandamus, Case No. 91-1487 (D.C. Cir., filed October 4, 1991), at 2-3; *MCI Telecommunications Corp. v. FCC*, No. 89-1382, Transcript of Oral Argument held September 11, 1990, at 50-51 (comments of AT&T counsel in petition for review of Commission's Tariff 12 decision).

[26] *Cf. Arizona Grocery v. Atchison, Topeka and Santa Fe Railway Co.*, 284 U.S. 370, 389 (1932); *Nader v. FCC*, 520 F.2d 182, 202-203 (D.C. Cir. 1975) (rates charged consistent with agency prescription protect carrier against subsequent claim that rate was unlawful). *See also Bowen v. Georgetown University Hospital*, —— U.S. ——, 109 S.Ct. 468, 480 (1988) (Scalia, J., concurring) (suggesting that retroactive adjudication may be improper where conflicting "pre-existing interpretive rule construing [statutory] requirements is in effect").

of a request for relief against MCI, is in practical effect a challenge to the Commission's previously adopted and effective forbearance rule.

15. It is well established that agencies have broad discretion in determining whether to make policy via rulemakings or adjudications. Thus, in *SEC v. Chenery*, the United States Supreme Court said that "the choice made between proceedings by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[27] The Court recognized, however, that rulemaking proceedings are more appropriate for considering general rules of widespread applicability.[28]

16. The Commission's forbearance rule was adopted in a notice and comment rulemaking proceeding and has been in place for almost ten years. This rule represents one of the cornerstones of our regulation of the long-distance industry. Any change in this fundamental policy would have a significant impact on a broad range of customers and providers of telecommunications services across the nation. It would be inappropriate for us to consider a modification or repeal of this policy, with so potentially widespread an impact, in the context of a two-party adjudicatory proceeding, as opposed to a rulemaking proceeding. In a rulemaking, all interested parties will have an opportunity to comment. In addition, a rulemaking proceeding will permit us to address our forbearance rule as it applies to all nondominant carriers, and to consider and implement any changes that we may make to it on an industry-wide basis.[29] Given the funda-

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[27] 332 U.S. 194, 203 (1947).

[28] *Id.* at 202, 203; *see also American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985); *Telocator Network of America v. FCC*, 691 F.2d 525, 551 (D.C. Cir. 1982).

[29] By contrast, any order that we issue on AT&T's complaint would necessarily bind only MCI. *See NLRB v. Wyman-Gordon*

mental importance of these matters, the coordinated and comprehensive approach made possible by a rulemaking will reduce industry uncertainty, while ensuring the smoothest possible transition to any new rules that may be necessary.

IV. CONCLUSION

17. We now deny in part and dismiss in part AT&T's complaint. To the extent that AT&T seeks damages against MCI for its past conduct in offering service at rates and on terms and conditions not contained in tariffs filed with the Commission, AT&T's claim directly conflicts with the duly adopted and effective "forbearance" rule upon which MCI was entitled to rely. To the extent that AT&T seeks injunctive relief requiring MCI to file tariffs in the future, we find such broad relief changing the basic rules governing the long-distance industry to be inappropriate in the context of this adjudicatory proceeding between only two of the industry's numerous participants. The proper procedural vehicle for considering changes in our forbearance rule is a rulemaking proceeding. In a companion order adopted today, we institute such a proceeding so that the issues raised by AT&T may be addressed in an appropriate manner.

V. EX PARTE RULES

18. In light of the interrelationship between this proceeding and the Notice of Proposed Rulemaking we

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Company, 394 U.S. 759, 763-766 (1969) ("adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. . . . But this is far from saying . . . that commands, decisions or policies announced in adjudication are 'rules' in the sense that they must, without more, be obeyed by the affected public.") At the same time, such an order would have major precedential implications for other nondominant IXCs, and could, depending upon the decision, create considerable uncertainty both as to their regulatory status and the lawfulness of many of their current offerings.

adopt today, to the extent this complaint proceeding remains pending through a petition for reconsideration or appeal of this order, the proceeding will henceforth be deemed a nonrestricted proceeding under the Commission's *ex parte* rules.[30] *Ex parte* presentations will be permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules.[31]

VI. ORDERING CLAUSE

19. For the reasons set forth above, pursuant to 47 U.S.C. § 208, IT IS ORDERED THAT AT&T'S above-referenced complaint is DENIED in part and DISMISSED in part.

FEDERAL COMMUNICATIONS COMMISSION

DONNA R. SEARCY
Secretary

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[30] *See* 47 C.F.R. § 1.1200(a).

[31] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

Nos. 93-356, 93-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Respondent.

UNITED STATES OF AMERICA and
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Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Respondent.

Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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AT&T'S BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the D.C. Circuit correctly applied the controlling decisions which hold that the Federal Communications Commission has no authority to "remove" the provisions of 47 U.S.C. § 203 that require that all common carriers shall file their rates with the Commission and charge only the filed rate.

STATEMENT REQUIRED BY RULE 29.1

American Telephone and Telegraph Company ("AT&T") has no parent company. AT&T Capital Corporation (and its subsidiary AT&T Credit Corporation) and NCR Corporation are subsidiaries of AT&T having outstanding debt in the hands of the public.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Nos. 93-356, 93-521

MCI TELECOMMUNICATIONS CORPORATION,
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UNITED STATES OF AMERICA and
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Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AT&T'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners the Federal Communications Commission ("FCC") and MCI seek review of an unpublished order of the D.C. Circuit that does not conflict with any decisions of this Court or of any court of appeals. To the contrary, that order was required by the plain language of the statute it applied, by a long line of this Court's decisions culminating in *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and by prior court of appeals' decisions. These decisions hold that the FCC and other regulatory agencies cannot relieve any common carriers from their statutory obligation to charge only "filed rates," regardless of whether the carriers possess "market power." *Compare* FCC Pet. i.

1. Section 203 of the Communications Act of 1934, 47 U.S.C. § 203, sets forth for telecommunications common carriers what has come to be known as the "filed rate" doctrine. That doctrine "prohibits a[ny] regulated entity from charging rates 'other than those properly filed with the appropriate federal regulatory authority.'" *Consolidated Edison Co.* v. *FERC*, 958 F.2d 429, 431 n.2, 432 (D.C. Cir. 1992) (citations omitted).

Sections 203(a) and 203(c) prescribe complementary obligations and prohibitions. Section 203(a) establishes the mandatory ratefiling obligations:

> Every common carrier . . . *shall* . . . file with the Commission and . . . keep open for public inspection schedules showing *all* charges for itself . . . and showing the classifications, practices, and regulations affecting such charges.

47 U.S.C. § 203(a) (emphasis added). Section 203(c) establishes the counterpart prohibitions against the provision of service at any rate other than that filed:

> [*N*]*o* carrier shall (1) charge, demand, collect, or receive *a greater or less or different compensation for* such communication, or for any service in connection therewith, between the points named in any such schedule *than the charges specified* in the schedule then in effect, or (2) *refund or remit* by any means or device *any portion of the charges so specified*, or (3) extend to any person any privileges or facilities in such communication, or employ or *enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.*

47 U.S.C. § 203(c) (emphasis added).

2. In the early 1980s, the FCC initiated a proceeding —known as *Competitive Carrier*—in which it addressed the scope of Section 203. In successive Reports in that proceeding, the FCC adopted a series of rules reducing the tariff-filing obligations of what it termed "non-dominant carriers," including virtually all of the competitors of respondent American Telephone and Telegraph Co. ("AT&T"). In particular, the FCC determined in its *Fourth Report* to "forbear" from "applying" to AT&T's competitors, including MCI, the ratefiling requirements of Section 203. The FCC acknowledged that the filing of rates was "a" congressionally selected "means for the Commission to ensure the Act's objective of reasonable and not unjustly discriminatory rates." But the Commission concluded that, because of intervening events that Congress could not have foreseen, the "fundamental goals" of the Act would better be served by this new "forbearance" policy.[1]

In 1984, the FCC decided in its *Sixth Report* not only to "forbear" from "applying" the ratefiling requirement to non-dominant carriers, but affirmatively to prohibit such filings.[2] MCI petitioned for review of that rule. It contended that the *Sixth Report* was "in direct violation of Section 203 of the Communications Act, which provides that *every* common carrier *shall* file tariffs with the Commission."[3]

The D.C. Circuit agreed and vacated the *Sixth Report*. In an opinion written by now-Justice Ginsburg, the D.C. Circuit held that Section 203's requirements that "every" common carrier "shall" file its rates, 47 U.S.C. § 203(a), and that "no" common carrier "shall" charge any rates other than those so filed, 47 U.S.C. § 203(c), impose mandatory obligations on common carriers that the

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[1] *See Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor*, CC Docket No. 79-252, Second Report & Order, 91 F.C.C.2d 59, 70-71 (1982) (*"Second Report"*); *id.*, Fourth Report & Order, 95 F.C.C.2d 554 (1983) (*"Fourth Report"*).

[2] *See id.*, Sixth Report & Order, 99 F.C.C.2d 1020 (1985) (*"Sixth Report"*).

[3] *MCI Telecommunications Corp.* v. *FCC*, No. 85-1030 (D.C. Cir.), Br. of MCI, p. 10 (Apr. 1, 1985) (emphasis in original).

agency has no power to waive under Section 203(b) of the Act or otherwise. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). This opinion is reproduced in the Appendix to this Opposition. Resp. App. 1a-20a.

The FCC argued in that appeal that its power to "modify" the requirements of Section 203 in "particular instances" or "special circumstances" under Section 203 (b)(2), 47 U.S.C. § 203(b)(2), permitted it to "exempt" carriers from the statutory ratefiling requirements. The court rejected that assertion. *Id.* at 1191-92; Resp. App. 11a. It noted that the FCC's position was inconsistent not only with the plain language of the statute, but also with decisions of the Court of Appeals for the Second Circuit, *id.* at 1192 (Resp. App. 11a-12a) (citing *AT&T* v. *FCC*, 572 F.2d 17, 25 (2d Cir. 1978), and *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir. 1973)), and, until very recently, with decisions of the FCC itself. *Id.* at 1192-93 (Resp. App. 13a-14a) (citing *Western Union Tel. Co.*, 75 F.C.C.2d 461, 474 (1980)). Finally, the court stated that, in light of its holding vacating the *Sixth Report*, the FCC's earlier "forbearance" order could continue to stand, if at all, only as an exercise of the agency's enforcement discretion rather than as a rule that purported to exempt any carriers from the statutory ratefiling obligation. *Id.* at 1190-91 n.4 (Resp. App. 8a n.4).

3. Notwithstanding this 1985 decision of the D.C. Circuit, MCI began in mid-1987 to violate Section 203 by refusing to file rates for many of its services. When it learned of this practice, AT&T filed a complaint with the FCC under Section 208 of the Act, 47 U.S.C. § 208, challenging MCI's violation of its statutory obligations. AT&T explained that this conduct enabled MCI to obtain a substantial and unlawful competitive advantage: it could match or undercut AT&T's published rates, while AT&T was "unable to match [its] competitors' unknown prices." *Regular Common Carrier Conference* v. *United States*,

793 F.2d 376, 379 (D.C. Cir. 1986). AT&T sought a cease and desist order to bring MCI into compliance with the law, and damages for the competitive injuries caused by MCI's violations.

Ten months after AT&T's complaint had been filed (during which time the FCC took no action to resolve it), this Court decided *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and eliminated any possibility that the FCC might have the authority that MCI claimed. The Court in *Maislin* construed the statutory filing requirements of the Interstate Commerce Act that are the model for Section 203. *Maislin* held that these requirements bind all carriers; that the provision of services at secret, unfiled rates constitutes the unlawful price discrimination that these ratefiling requirements were designed to prevent; and that the Interstate Commerce Commission could not authorize the provision of services at rates lower than the filed rates. *Id.* at 130-35.

The FCC was statutorily required to resolve AT&T's complaint within a year of the complaint's filing. 47 U.S.C. § 208(b)(1). When two and a half years had passed with no agency action, AT&T filed a petition for mandamus with the court of appeals asking the court to direct the FCC to act. The FCC responded by representing that it would rule on AT&T's complaint within 30 days.[4] Based on that representation, the court denied the petition.[5]

4. Approximately 30 days later, the FCC issued its decision denying and dismissing AT&T's complaint. MCI Pet. 57a. That decision stated, for the first time since *MCI* v. *FCC* was decided seven years earlier, that the FCC's forbearance policy was not, after all, "merely an exercise of the Commission's prosecutorial discretion."

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[4] *In re AT&T*, No. 91-1487 (D.C. Cir.), Response of FCC to AT&T's Petition for a Writ of Mandamus (Dec. 18, 1991).

[5] Order, *In re AT&T*, No. 91-1487 (D.C. Cir. Jan. 24, 1992).

Rather, the Commission announced, it was a "binding substantive rule" that purported to have "removed" the ratefiling requirement. MCI Pet. 64a.

The FCC nevertheless "declined to decide forthrightly" whether such a rule could be lawful in light of *Maislin* and *MCI* v. *FCC*. MCI Pet. 43a. The FCC instead dismissed AT&T's request for a cease and desist order on the ground that it intended to reexamine the lawfulness of its forbearance policy in a future rulemaking. MCI Pet. 64a-66a. And it denied AT&T's request for damages on the ground that it would be "unfair" to find MCI liable for its statutory violations when MCI had acted consistently with the FCC's policy. MCI Pet. 63a-64a. Thus, the FCC purported to authorize MCI to continue to violate Section 203, with immunity from damages, at least until the FCC completed a new rulemaking. *See* MCI Pet. 51a.

AT&T petitioned for review, and the court of appeals granted its petition. The court had "little difficulty in concluding" that the FCC's action was arbitrary and capricious and unlawful. MCI Pet. 48a. It held that the FCC had a statutory obligation under Sections 206-208 of the Communications Act, 47 U.S.C. §§ 206-208, to adjudicate complaints "under the law currently applicable," and that the FCC had failed to do so. MCI Pet. 45a. The court attributed the FCC's "troubling tactics" to an "obvious strategy" of trying to "keep the [forbearance] rule in effect as long as possible despite serious doubt that the rule could not withstand judicial review." MCI Pet. 48a-49a. It then held, in reliance on *MCI* v. *FCC* and *Maislin*, that the rule was "plainly contrary to Section 203." MCI Pet. 39a. The Court observed that the FCC "will have to obtain congressional sanction for its desired policy course." MCI Pet. 54a.

5. Approximately two weeks after the court of appeals issued *AT&T* v. *FCC*, the FCC released its Report and Order in the rulemaking proceeding. MCI Pet. 3a ("*Rule-*

making Order").[6] The FCC reiterated its position that Section 203(b) granted it authority to remove the statutory ratefiling requirement. MCI Pet. 12a-20a. It also concluded that Congress had "acquiesced" in this interpretation by failing to enact legislation disapproving it. MCI Pet. 22a-25a.

AT&T petitioned for review. In the unpublished order that is the subject of the petitions for certiorari, the Court of Appeals granted AT&T's petition and summarily reversed the *Rulemaking Order*. It held that "[t]he merits of the parties' positions are so clear as to warrant summary action" and that "[t]he decision of this court in *American Tel. & Tel. Co.* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992) conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." MCI Pet. 1a-2a.

REASONS FOR DENYING THE WRIT

The D.C. Circuit's unpublished order does not present any question that warrants review by this Court. It reaffirms and applies the many decisions setting forth the longstanding "filed rate" doctrine and holding that the ratefiling requirements of the Communications Act are mandatory and that only Congress, and not the FCC, can remove them for any carrier, regardless of whether it possesses "market power." That holding is required by the statute's plain language, is compelled by this Court's decision three years ago in *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and is consistent with every other court of appeals' decision to address the issue.

Nor does this case present any issue that merits review concerning the appropriate degree of deference to be af-

[6] The FCC's practice is frequently to adopt an order on one date, and then release that order on a later date. The *Rulemaking Order* was adopted one week before the D.C. Circuit's decision in *AT&T* v. *FCC* issued.

forded to agency interpretations of statutes. Here, as elsewhere, the D.C. Circuit applied the standards of *Chevron* and its many progeny. The D.C. Circuit has rejected the FCC's interpretation of the Communications Act on the ground that it is contrary to the statute's unambiguous language and to the long line of decisions of this Court and other courts that had rejected identical such agency claims.

In fact, the FCC's petition reveals that its real quarrel is not with the D.C. Circuit's decision, but with the filed rate requirement of the Communications Act. If the FCC believes that these requirements are outdated and administratively burdensome (FCC Pet. 15-18), the appropriate remedy is not to ask this Court to overrule a long line of settled precedent construing the filed rate requirements of the Communications Act. Rather, its remedy lies with Congress. Congress has adopted several recent amendments to the ratefiling provisions of the Act, and is fully capable of assessing the FCC's arguments for regulatory change. Alternatively, the FCC may explore other measures of reducing regulatory burdens—as the FCC has done in a recent order that it adopted in response to the D.C. Circuit's decision. These other options underscore that the D.C. Circuit's unpublished decision does not raise any matter of national importance warranting this Court's review and that the petitions are, at best, premature.

I. CONSISTENT WITH EVERY OTHER FEDERAL COURT DECISION ON THE SUBJECT, THE D.C. CIRCUIT CORRECTLY REAFFIRMED THE FILED RATE DOCTRINE IN HOLDING THAT THE FCC LACKS AUTHORITY TO REMOVE THE RATEFILING REQUIREMENT OF SECTION 203.

The court of appeals' holding that the statutory ratefiling requirement is mandatory, and cannot be removed by the FCC, is correct and presents no conflict with any decision of this Court or any other court. To the contrary, it is consistent with every decision addressing the issue.

This Court's 1990 decision in *Maislin* considered at length the question of the power of an administrative agency (there the ICC) to use its discretionary powers to modify the strictures of the filed rate doctrine for carriers (there truckers) who operate in competitive markets and lack market power.[7] The Communications Act embodies filed rate, non-discrimination, and agency modification provisions that were taken directly from the provisions of the Interstate Commerce Act ("ICA").[8] Indeed, the ratefiling requirements in the two statutes are worded indistinguishably.[9]

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[7] This ruling in *Maislin* was in turn reaffirmed by this Court in *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993).

[8] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective"); *see also* 73 Cong. Rec. 10313 (1934) (statement of Rep. Rayburn) (ICA Section 6 as basis of Communications Act Section 203); 73 Cong. Rec. 8823 (1934) (statement of Sen. Dill). *See generally American Broadcasting Cos.* v. *FCC*, 643 F.2d 818, 820-21 (D.C. Cir. 1980); *AT&T* v. *FCC*, 487 F.2d 865, 879 (2d Cir. 1973).

[9] *Compare* 47 U.S.C. § 203(a) (Communications Act tariff filing requirement) *with* 49 U.S.C. § 6(1) (original ICA tariff filing requirement) *and* 49 U.S.C. § 10762(a) (recodified ICA tariff filing requirement). *Compare* 47 U.S.C. § 203(b)(2) (Communications Act authorization for particular agency modification of requirements) *with* 49 U.S.C. § 6(3) (original ICA agency authorization provision) *and* 49 U.S.C. § 10762(d)(1) (recodified ICA agency authorization provision). *Compare* 47 U.S.C. § 203(c) (first clause, Communications Act prohibition of service in absence of filed rates) *with* 49 U.S.C. § 6(7) (original ICA prohibition against service without filing rates) *and* 49 U.S.C. § 10761(a) (recodified ICA prohibition against service without filing rates). *Compare* 47 U.S.C. § 203(c) (second clause, Communications Act prohibi-

Based on this extensive examination, *Maislin* concluded that none of the broad delegations of agency power in the ICA empowered the ICC to permit provision of service at unfiled rates. The Court gave two related reasons in support of that conclusion.

First, even if individual provisions of the ICA could be read, in isolation, as authorizing the Commission to "sanction[] adherence to unfiled rates," such a policy determination would "undermine[] the basic structure of the Act." 497 U.S. at 132. The Court reasoned that charging secret unfiled rates that are below the filed rate is a *per se* violation of the ICA counterparts to Section 202(a) as well as Section 203 of the Communications Act and that "[c]ompliance with [the ratefiling requirements] is 'utterly central' to the administration of the Act." *Id.* (quoting *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986) (Scalia, J.)). Without adhering to the ratefiling requirement, the Court explained:

> The ICC cannot review in advance the reasonableness of *unfiled* rates. Likewise, other shippers cannot know if they should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and never disclosed to the ICC.

497 U.S. at 132-33 (emphasis in original). Accordingly, the Court held that the ICC's facially broad power to proscribe "unreasonable practices" could not be used to undermine the filed rate requirement.

The FCC's attempt to use its "modification" authority of Section 203(b) to excuse compliance with statutory ratefiling requirements is, if anything, in even greater tension with the basic design of the Act. The FCC's position would allow every common carrier in the industry (except

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tion of rebates or service at other than filed rates) *with* 49 U.S.C. § 6(7) (original ICA anti-rebate provision) *and* 49 U.S.C. § 10761 (recodified ICA anti-rebate provision).

AT&T and local exchange carriers) to offer service at unfiled rates. Thus, even if the scope of the modification power were ambiguous (which, as we show below, it is not), *Maislin* establishes that it cannot be construed as authorizing the agency to abrogate the filed rate doctrine, for that would be contrary to the core structure of the Act.

Second, the Court found that the ICC's interpretations of its unreasonable practices authority were inconsistent with countless decisions of this Court requiring strict adherence to the filed rate doctrine, notwithstanding its "harsh effects." 497 U.S. at 128 (citing *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Southern Pac. Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 343-44 (1982); *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 484-85 (1939); *Louisville & N. R.R.* v. *Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924)).[10] "For a century," the Court explained, it had repeatedly interpreted the statute's tariff filing and non-discrimination provisions as barring carriers' provision of service at unfiled rates. *Maislin*, 497 U.S. at 130. Given this extensive authority, the agency could not depart from this interpretation. *Id.* at 130-36. The Court also specifically rejected the agency's assertion that increased competition justified allowing carriers to charge unfiled rates: "exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed rate requirements." *Id.* at 135. Indeed, because the case involved bankrupt truckers who manifestly had no market power, *Maislin* establishes that the filed rate requirements are mandatory for all carriers and that the presence or absence of market power is irrelevant.

MCI seeks to avoid the clear holding of *Maislin* by asserting that the FCC's modification power under Section

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[10] *See also Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932); *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Texas & Pac. Ry.* v. *Mugg*, 202 U.S. 242 (1906); *Gulf, C. & S.F. Ry.* v. *Hefley & Lewis*, 158 U.S. 98 (1895).

203(b) exceeds the ICC's power under 49 U.S.C. § 10762(d)(1). MCI points out that the latter provision is located in the same section of the ICA as the provision requiring carriers to file tariffs, 49 U.S.C. § 10762(a)(1) (which is parallel to Section 203(a) of the Communications Act), but is in a different section of the ICA from the provision requiring carriers to provide service only at tariffed rates, 49 U.S.C. § 10761(a)(1) (which is parallel to Section 203(c)). Thus, MCI argues, the ICC is authorized only to modify the parallel provision to Section 203(a), while the FCC may modify either Section 203(a) or 203(c).

MCI's argument is baseless for several reasons. First, even if there were other differences between the FCC's and ICC's powers, what is at issue here is the power of the FCC to modify the ratefiling requirement of Section *203(a)*, and MCI's own argument establishes that the D.C. Circuit correctly held that the FCC, like the ICC, has no authority to waive *this* requirement. It is thus irrelevant whether the ICC lacks power to modify the ICA provision parallel to Section 203(c).

Second, the ICC's modification power is *not* less than the FCC's. Prior to the recodification of the ICA in 1978, all of the relevant ICA provisions, including the tariffing, modification, and filed-rate provisions, were contained in Section 6 of the ICA. *See* former 49 U.S.C. §§ 6(1), 6(3), 6(7). Further, former Section 6 of the ICA was the model for Section 203 of the Communications Act. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934); 73 Cong. Rec. 10313 (1934) (statement of Rep. Rayburn); *AT&T* v. *FCC*, 487 F.2d 865, 879 (2d Cir. 1973); p. 9 n.8, *supra*. Thus, prior to recodification, the ICC had the same modification power as the FCC. And when the ICA was recodified, Congress explicitly enacted a provision of positive law that states that the recodification "may not be construed as making a substantive change in the laws replaced." Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466.

In any event, it is well established that the filed rate doctrine applies not only under the ICA, but also under other federal regulatory statutes that contain ratefiling requirements patterned after the ICA. Thus, the filed rate doctrine has been repeatedly applied under the Federal Power Act and the Natural Gas Act.[11] And this Court has specifically recognized that the doctrine applies under the Communications Act.[12]

The FCC (Pet. 13) attempts to distinguish *Maislin* on its facts by claiming that it addressed only "[t]he question of Commission authority to authorize deviation from a rate that has been filed." But this completely ignores the Court's reliance on the importance of the ratefiling requirement to the structure of the Act, and on the unbroken chain of authority on which the Court relied, dating back nearly 100 years. Based upon these considerations, *Maislin* held that the requirement that carriers charge only filed rates is essential to the Act's nondiscrimination and other requirements, concluded that no deference is due contrary agency determinations, and rejected an agency's avoidance of the filed rate doctrine based upon appeals to policy, to competition, and to subsequent congressional ratification. *See* pp. 5, 10-12, *supra*. The FCC fails to acknowledge that, for *all* of

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[11] *See Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981); *Montana-Dakota Utils Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951).

[12] *See Ambassador, Inc.* v. *United States*, 325 U.S. 317, 323 (1945) (observing that all communications rates, charges, practices, classifications, and regulations "must be filed with the Commission in the form it prescribes, may not be changed except after due notice, and must be observed in the conduct of the business by the company" (citing 47 U.S.C. § 203(a), (b), (c))); *see also Western Union Tel. Co.* v. *Priester*, 276 U.S. 252 (1928); *Western Union Tel. Co.* v. *Esteve Bros. & Co.*, 256 U.S. 566 (1921) (recognizing doctrine under provisions of ICA governing telegraph companies and later incorporated into Communications Act).

these reasons, *Maislin* supports the court of appeals' determination and is directly contrary to the FCC's petition.

Nor is there any conflict among the courts of appeals on this issue. Those courts have uniformly construed the filed rate requirements and Section 203(b) of the Communications Act as not empowering the FCC to allow carriers to offer services at unfiled rates. Like the D.C. Circuit, the Second Circuit has surveyed the text and legislative history of Section 203(b) (which it noted was derived directly from the Interstate Commerce Act) and concluded that "under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty days notice provision." *AT&T* v. *FCC*, 487 F.2d at 879; *see also AT&T* v. *FCC*, 572 F.2d 17, 25 (2d Cir. 1978) (setting forth Section 203(a)'s tariff filing requirement and stating that "[w]e are aware of no authority for the proposition that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met").

Indeed, until very recently this was the FCC's understanding as well. Shortly after the FCC initiated its *Competitive Carrier* proceeding, it stated that there was "no question" that tariffs are "essential to the entire administrative scheme of the Act." *Western Union Tel. Co.*, 75 F.C.C.2d 461, 474 (1979). The FCC explained that "[t]he importance of tariffs and the requirement that common carriers—*all common carriers*—must offer all of their communications services to the public through published tariffs is well established." *Id.* (emphasis added). Moreover, that was the position the FCC argued to the Second Circuit, when it explained that "[t]he Commission has affirmative commands from Congress to ensure . . . that rates and practices are set forth in tariffs filed with the FCC," and that "[t]he agency has no authority to ignore these commands, even if market forces arguably are present which undercut the 'natural monopoly' justification for regulation." *AT&T* v. *FCC*, 572 F.2d 17 (2d Cir. 1978), Brief of FCC, pp. 49-50 (quoted in *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1193 (D.C. Cir. 1985) (Resp. App. 14a)).

The courts of appeals' uniform interpretation, and the FCC's previous interpretation, of Section 203(b) are compelled by the plain meaning of Section 203. First, Section 203(b) authorizes the FCC only to "modify," rather than to eliminate or abandon, the tariff filing requirement at the heart of the Act. As the court of appeals explained, Section 203(b) must be given this limited construction because "modify" in this context is "defined as '[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce.'" *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985) (Ruth Bader Ginsburg, J.) (quoting *Black's Law Dictionary* 95 (5th ed. 1979)) (Resp. App. 11a).

Second and more fundamentally, the FCC's power to modify is limited to "particular instances" or "special circumstances or conditions." 47 U.S.C. § 203(b)(2). MCI cites such language in the *ICA* as evidence that the *ICC*'s authority is limited,[13] while conspicuously omitting to mention that identical limitations apply to the FCC's Section 203(b) power. *See* MCI Pet. 21-22 (partially quoting 47 U.S.C. § 203(b)). Section 203(b), in fact, also authorizes the FCC to make modifications only "in particular instances or by general order applicable to special circumstances or conditions," 47 U.S.C. § 203(b), which, as MCI concedes for indistinguishable language in the ICA, substantially constrains an agency in precisely the manner the D.C. Circuit found. The FCC's forbearance policy, in contrast, makes avoidance of the tariff filing requirement the general rule applicable to hundreds of carriers, and

[13] *See* MCI Pet. 21 (quoting 49 U.S.C. § 10762(d)(1), limiting ICC modification power to "change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances").

leaves the Act's central filing requirements applicable only to relatively few, including AT&T.

Section 203(c) confirms that the FCC's modification power does not extend to allowing carriers to offer services at unfiled rates. The first clause of Section 203(b) requires that tariffs be filed in accordance with provisions governing their form and content, "unless otherwise provided by or under authority of this Act." MCI relies on this clause to argue that the FCC has sweeping authority under Section 203(b) to eliminate the requirements of Sections 203(a) and 203(c). MCI Pet. 18. But MCI completely fails to mention Section 203(c)'s second clause, which prohibits charging rates other than those filed in tariffs. This clause is unqualified and not similarly subject to the FCC's modification power.[14]

In addition, both the FCC (Pet. 13) and MCI (Pet. 18) omit the remaining language of even the first clause of Section 203(c), thus creating the erroneous impression that the initial clause addresses the core tariff filing requirement. That additional language indicates that carriers may be relieved from filing schedules "in accordance with the provisions of this Act and with the regulations made thereunder." 47 U.S.C. § 203(c). Even viewed in isolation, this clause supports an FCC modification authority that extends only to additional requirements of the Act (beyond the core filing requirements preserved in the remainder of Section 203(c)) and to the FCC regulations detailing the content and form of tariff schedules, how they must be displayed and transmitted, and similar details.

[14] In any event, the reference in the first clause of Section 203(c) to exceptions "otherwise provided by or under authority of this Act" does not suggest that the FCC has an otherwise unstated authority to waive Section 203. That clause refers to other provisions of the Act that provide for limited and explicit statutory exceptions to the filing requirements. *See* 47 U.S.C. § 211(b) (expressly authorizing the FCC to "exempt" carriers from submitting copies of "minor contracts"); 47 U.S.C. § 203(a) (tariff filing requirement not applicable to "connecting carriers").

Finally, the FCC and MCI argue that Congress, through the Telephone Operator Consumer Services Improvement Act (TOCSIA) (codified at 47 U.S.C. § 226), "acquiesced in the permissive detariffing rule." MCI Pet. 19; *see id.* 22a; FCC Pet. 15. This argument is insubstantial.[15] "[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947). Here, the statute—Section 203—is unambiguous, and Congress cannot silently "acquiesce" in an interpretation contrary to the statute's plain meaning. *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992) ("administrative interpretation followed by congressional reenactment cannot overcome the plain language of a statute"); *accord Arkansas Best Corp.* v. *Commissioner*, 485 U.S. 212, 222 n.7 (1988); *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978); *TVA* v. *Hill*, 437 U.S. 153, 173 (1978).

Beyond that, Congress' recent grant to the FCC of statutory authority to limit the filing requirements only for commercial mobile carriers, *see* 47 U.S.C. § 332(c)(1)(A), confirms both that Congress does not rely upon "acquiescence" when it wishes to grant the FCC the powers that petitioners seek and that Congress hardly assumes that the FCC already possesses such powers. In any event, TOCSIA specifically disclaims any such intent or effect. It was enacted to address widespread complaints associated with a narrow segment of the industry—operator service providers. TOCSIA specifically provides—in a provision entitled "[s]tatutory construction" that neither the FCC nor MCI even mentions—that "[n]othing in this

[15] The claim by the FCC (Pet. 14) that "the D.C. Circuit has never considered" this Congressional acquiescence argument is false. In *AT&T* v. *FCC*, the FCC fully briefed the argument based on TOCSIA (although it declined formally to endorse the argument prior to the conclusion of its rulemaking), and AT&T in reply responded to it. *See AT&T* v. *FCC*, No. 92-1053 (D.C. Cir.), FCC Br. 20-21; *id.*, AT&T Br. 26.

section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this Act." 47 U.S.C. § 226(i). Because Section 203 is one of the "other sections of this Act," TOCSIA cannot be read to alter the historic understanding of that section's mandatory ratefiling requirements.[16]

II. THIS CASE PRESENTS NO ISSUE INVOLVING DEFERENCE TO AGENCY DETERMINATIONS UNDER *CHEVRON* OR OTHERWISE.

There is also no merit to petitioners' claims that this case presents an important question of what deference is due an agency's interpretation of the statute that governs it. *See* FCC Pet. 10-14; MCI Pet. 13-16. Here, as elsewhere, the D.C. Circuit has applied the principles established in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny and precursors.

Chevron holds that courts are to reverse agency interpretations of a statute where they are contrary to the statute's unambiguous terms or to any reasonable interpretations of them. 467 U.S. at 842-43. In *Maislin*, moreover, the Court further held that "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). This Court recently reaffirmed this holding,

[16] Contrary to the FCC's *Rulemaking Order*, MCI Pet. 24a, TOCSIA's requirement that operator service providers file "informational tariff[s]" does not become "mere surplusage" if Section 203 is given effect. Section 203 applies only to "common carriers." TOCSIA's tariffing requirement applies more broadly to non-common carriers as well. 47 U.S.C. § 226(a)(9). Those informational tariffs, moreover, are required to contain substantial data that Section 203 does not require be filed, such as amounts of commissions and estimates of traffic volume. 47 U.S.C. § 226(h)(1)(A).

stating that judicial construction of a statute binds subsequent courts and eliminates "any issue of deference to the [agency]." *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847 (1992).

These are the principles that the D.C. Circuit applied in the unpublished, summary decision that is the subject of the petitions. It vacated the FCC's order on the ground that the earlier decision in *AT&T* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992), "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." MCI Pet. 2a. That earlier decision (*see* MCI Pet. 37a), in turn, relied on the still earlier decision in *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985), where the D.C. Circuit (in the opinion by now-Justice Ginsburg appended to this opposition) rejected the FCC's interpretation on the ground that it "departs from any plausible reading of the statute's text." 765 F.2d at 1193 (Resp. App. 14a). As the D.C. Circuit made explicit, this was a determination that "the language of the statute was not susceptible to the Commission's reading" and that the interpretation is entitled to no deference and must be set aside under *Chevron*. MCI Pet. 52a;[17] *see Chevron*, 467 U.S. at 842-43.

In short, the D.C. Circuit's prior decisions on this issue applied accepted principles of administrative law in rejecting the FCC's interpretation of Section 203. In all events, the unpublished decision that is the subject of the petitions properly followed the prior decisions of that Court and this Court. Indeed, given the authoritative deci-

[17] The D.C. Circuit specifically noted in *AT&T* v. *FCC* that although *MCI* v. *FCC* does not "cite" *Chevron*, it "postdates" that decision (MCI Pet. 52a n.11), and the holding that the FCC's position "departs from any plausible reading of the statute's text" constituted the determination required by *Chevron*. *MCI* v. *FCC*, 765 F.2d at 1193 (Resp. App. 14a); *compare Chevron*, 467 U.S. at 842-43.

sions of this Court in *Maislin* and of the D.C. Circuit and the Second Circuit, the doctrine of *stare decisis* independently barred the D.C. Circuit from deferring to the FCC's contrary interpretation of Section 203, and establishes that there is no possible issue under *Chevron*. *See Maislin*, 497 U.S. at 131; *Lechmere*, 112 S. Ct. at 847.

Finally, the FCC and MCI stretch the boundaries of plausible argument in suggesting that the D.C. Circuit requires a lesson in applying *Chevron*. *Chevron* is the daily basis of much of the D.C. Circuit's work,[18] and neither the FCC nor MCI points to any D.C. Circuit cases or doctrines that diverge from the appropriate deference mandated by *Chevron*. This case presents no significant issue regarding the appropriate scope of deference to agency determinations, under *Chevron* or otherwise.

III. THE AVAILABLE LEGISLATIVE REMEDY AND THE FCC'S RECENT *RANGE TARIFF ORDER* INDEPENDENTLY ESTABLISH THAT THE PETITIONS RAISE NO ISSUE OF NATIONAL IMPORTANCE AND THAT THE PETITIONS ARE, AT BEST, PREMATURE.

The FCC's petition and especially its emphasis upon "the anti-competitive effects of tariffs" (FCC Pet. 15-18 & n.*) confirm that petitioners' quarrel is with the Communications Act as currently in force rather than with the unpublished decision of the D.C. Circuit. Even if the FCC's assessment of the competitive effects of the filed rate doctrine were correct, the proper course would be to have the Communications Act amended or those effects ameliorated, rather than requesting this Court to overrule a century of established doctrine setting forth the scope and effect of the filed rate doctrine.

[18] *See generally* Schuck & Elliot, *To The* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984 (documenting increased deference to agency decisions by D.C. Circuit after *Chevron*).

Congress is entirely capable of assessing the FCC's claims that the Communications Act's tariffing requirements are outdated. In TOCSIA, Congress recently and specifically addressed the tariffing requirements applicable to a newly regulated set of telecommunications providers, and emphasized that nothing in the amendments affected Section 203(a)'s requirements. *See* 47 U.S.C. §§ 226(a)(9), 226(i); p. 18 n.16, *supra*. In the most recent Budget Act, Congress provided the FCC with the authority to relieve a small subset of carriers (commercial mobile service providers) of tariff filing obligations. *See* 47 U.S.C. § 332(c)(1)(A). Yet, here, the FCC has improperly turned to the courts for still broader relief, contrary to this Court's clear admonition that "[i]f there is to be an overruling of the [filed rate doctrine], it must come from Congress, rather than from this Court." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986).

Finally, even if the case were otherwise certworthy—as it is not—the petitions are premature. Under any view, the FCC possesses latitude under Section 203(b) to ameliorate adverse effects of the filed rate doctrine. The FCC's recent Memorandum Opinion and Order in *Tariff Filing Requirements for Nondominant Common Carriers*, CC Docket No. 93-36 (Aug. 18, 1993) ("*Range Tariff Order*"), accomplishes this goal in certain respects by continuing to excuse nondominant carriers from cost support requirements and by also modifying the form of and notice requirements for their tariff filings. These constitute the "streamlined procedures" that Section 203(b) authorizes the FCC to adopt. *See* FCC Pet. 18-19 n.*; p. 14, *supra*.

In addition, contrary to the FCC's misstatement (Pet. 18-19 n.*), the *Range Tariff Order* also purports substantively to relax the filing requirements of Section 203 for non-dominant carriers by permitting them to file tariffs *without* specifying the rates they actually charge. Instead,

under the terms of this *Range Tariff Order*, such carriers may satisfy their obligations under Section 203 by filing mere ranges of possible rates, as long as all of the rates they actually charge fall somewhere within those ranges. Like the earlier forbearance policy, the FCC rested this purported authorization of range filings on the ground that it would eliminate adverse effects of the filed rate requirement and undue burdens on certain carriers.

The *Range Tariff Order* demonstrates that the issue raised by the petitions is at best premature. In a pending review proceeding in the D.C. Circuit, AT&T has claimed that this "range tariff" aspect of the *Range Tariff Order* is the practical equivalent of the earlier "forbearance" rule and is unlawful for the same reason. By contrast, the FCC has argued that the earlier decisions are distinguishable and that the *Range Tariff Order* can be upheld under the law of the D.C. Circuit. If the FCC were to prevail on those claims, then the question whether it has the authority completely to dispose of the tariffing requirement, as it attempted to do here, will be of no moment. If the FCC does not prevail, then there will be time enough for the Court to consider whether that decision warrants further review. In short, even if the issues raised in the petitions were otherwise worthy of review (as they are not), the petitions are at best premature.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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November 3, 1993

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 85-1030

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

LEXITEL CORPORATION, AMERICAN SATELLITE COMPANY, TELTEC SAVING COMMUNICATIONS CO., MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., ET AL., COMPETITIVE TELECOMMUNICATION ASSOCIATION, UTILITIES TELECOMMUNICATION COUNCIL, THE WESTERN UNION TELEGRAPH CO., GTE SPRINT COMUNICATIONS CORPORATION, NETWORK I, INC., INTERNATIONAL BUSINESS MACHINES CORPORATION, AERONAUTICAL RADIO, INC., TELECOMMUNICATIONS RESEARCH AND ACTION CENTER, BELL TELEPHONE COMPANY OF PENNSYLVANIA, ET AL., RCA AMERICOM COMMUNICATIONS, INC., SOUTHERN SATELLITE SYSTEMS, INC., SATELLITE BUSINESS SYSTEMS, AD HOC TELECOMMUNICATIONS USERS COMMITTEE, RAINBOW SATELLITE, INC.,
Intervenors.

Petition for Review of an Order of the
Federal Communications Commission

Argued June 3, 1985

Decided July 9, 1985

As Amended July 9, 1985

Before TAMM, MIKVA and GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

Petitioner MCI Telecommunications Corporation (MCI) challenges a Federal Communications Commission (FCC or Commission) directive, captioned the *Sixth Report and Order*, issued in the Commission's long-evolving *Competitive Carrier* rulemaking.[1] The *Sixth Report* (1) requires all non-dominant common carriers of interstate telephone service, including MCI, to cancel their tariffs on file with the Commission within six months of the effective date of the order; and (2) declares that

[1] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor: Sixth Report and Order*, 57 RAD.REG.2d (P & F) 1391 (1985) (*Sixth Report*). *Competitive Carrier* rulemaking orders prior to the *Sixth Report* were: *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979) (*Notice*); *First Report and Order*, 85 F.C.C.2d 1 (1980) (*First Report*); *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445 (1981) (*Further Notice*); *Second Report and Order*, 91 F.C.C.2d 59 (1982) (*Second Report*), *reconsideration denied*, 93 F.C.C.2d 54 (1983); *Further Notice of Proposed Rulemaking*, 47 Fed.Reg. 17,308 (1982); *Third Further Notice of Proposed Rulemaking*, 48 Fed.Reg. 28,292 (1983); *Third Report and Order*, 48 Fed.Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983) (*Fourth Report*); *Fourth Further Notice of Proposed Rulemaking*, 49 Fed.Reg. 11,856 (1984) (*Fourth Further Notice*); *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984) (*Fifth Report*).

the Commission will not accept tariff filings from the non-dominant carriers in the future. MCI moved for a stay of the *Sixth Report*; on April 11, 1985, this court granted the motion and ordered expedited briefing and oral argument. *MCI Telecommunications Corp. v. FCC*, No. 85-1030 (D.C. Cir. Apr. 11, 1985).

The parties tender three issues for review: (1) whether MCI's challenge is timely; (2) whether the Commission has statutory authority to *prohibit* common carriers from filing tariffs; and (3) whether, assuming the Commission's authority, the *Sixth Report* was arbitrary and capricious. We conclude that MCI's petition for review is timely and that the Commission lacks authority to prohibit MCI and similarly situated common carriers from filing tariffs that, by statute, *every* common carrier *shall* file. *See* Communications Act of 1934 (Communications Act), § 203(a), 47 U.S.C. § 203(a) (1982). We therefore vacate the *Sixth Report* and remand this matter to the Commission for further consideration. In view of our conclusion that the FCC's order exceeds the agency's statutory authority, we do not reach the question whether the *Sixth Report* was arbitrary and capricious.

I. BACKGROUND

A. *Regulatory Proceedings*

In 1979, the FCC commenced its *Competitive Carrier* rulemaking, a proceeding shaped with a view toward gradual deregulation of the non-dominant common carrier interstate telephone industry. The Commission's initial *Notice* observed that non-dominant companies—those lacking market power—had no ability to charge supra-competitive rates or to engage in predatory pricing. *Notice*, 77 F.C.C.2d at 334. The FCC sought comments on a broad range of options, and its *First Report*, issued in 1980, announced streamlined regulations for non-

dominant common carriers. *First Report*, 85 F.C.C.2d at 30-49.[2]

In its 1981 *Further Notice*, the Commission focused on whether to undertake "definitional" or "forbearance" deregulation. The definitional approach entailed classifying certain non-dominant carriers of communication services as noncommon carriers. Because Title II of the Communications Act, 47 U.S.C. §§ 201-224 (1982), applies only to common carriers, this approach would have exempted non-dominant carriers from all Title II regulation. *See Further Notice*, 84 F.C.C.2d at 463-70. The forebearance approach involved abstaining from applying to non-dominant carriers certain Title II procedural requirements while maintaining the basic substantive requirements that carriers charge "just and reasonable" rates and not engage in "unreasonable discrimination." 47 U.S.C. §§ 201-202 (1982); *see Further Notice*, 84 F.C.C.2d at 471-91.

In its *Second Report*, released in 1982, the Commission adopted a forbearance position, *Second Report*, 91 F.C.C.2d at 61-62, which *permitted* resellers of basic services who owned no transmission facilities to cancel tariffs filed with the Commission and to convert to service on a private contract basis. *Id.* at 73. In subsequent 1983 and 1984 orders, the Commission extended permissive forbearance first to specialized common carriers (including MCI) and all resellers, *Fourth Report*, 95 F.C.C.2d at 557, and later to domestic satellite carriers providing domestic interstate service, miscellaneous common carriers, carriers providing domestic, interstate, and interexchange digital transmission networks, and affiliates of exchange carriers providing interstate interexchange services. *Fifth Report*, 98 F.C.C.2d at 1209-10.

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[2] Under the streamlined regulations, non-dominant carrier rates were presumed lawful, *First Report*, 85 F.C.C.2d at 33, and new rates could be filed on 14-day (rather than the previously required 90-day) notice. *Id.* at 37.

B. *Sixth Report*

The *Sixth Report*, target of MCI's petition for review, changed the permissive forbearance arrangement to a mandatory one. Under the previous orders, "forborne" carriers could elect to continue offering service pursuant to filed tariffs, or to cancel their filed tariffs and convert to private contracts. Many new entrants apparently chose not to file tariffs, but the vast majority of existing foreborne carriers opted to maintain their services under the tariff system. The Commission's *Fourth Further Notice* requested comment on whether forborne carriers should be required to cancel their tariffs and convert to a carrier-customer individual contract system. *Fourth Further Notice*, 49 Fed.Reg. at 11,857.

In the *Sixth Report* the Commission replied to the comments of numerous parties. The principal arguments confronting the FCC were these: (1) the Commission lacks authority to abolish tariffs, *Sixth Report*, 50 RAD. REG.2d at 1393; (2) the abolition of tariffs would eliminate the repository of information consumers need to detect discriminatory practices, *id.* at 1394; (3) conversion to private contracts would impose an excessive burden on carriers,, *id.* at 1394-95; and (4) there are less drastic alternatives, *id.* at 1395-96.

The Commission responded first that it found in section 203(b)(2) of the Communications Act, 47 U.S.C. § 203(b)(2) (1982), "express authority to exempt carriers from tariff filing requirements where appropriate." *Sixth Report*, 57 RAD.REG.2d at 1398. Consumers would benefit in several ways, the Commission reported. Dropping tariff filings would eliminate delay and opportunities for collusive pricing tactics. Furthermore, the absence of filed tariffs could be expected to stimulate the development of customer-specific and innovative service offerings. *Id.* at 1399-400. The Commission acknowledged that carriers "might perceive some increased administrative burdens, at least initially," *id.* at 1400, but it considered

this prospect outweighed by the positive features of de-tariffing non-dominant carriers. Sufficient information would be available to consumers, the FCC said, because carriers seeking to preserve their competitive position "will make their rates and other information, formerly contained in tariffs, available to the public." *Id.* at 1401. For these reasons, the Commission declared that forborne carriers henceforth would be prohibited from filing tariffs and that forborne carriers with tariffs on file would be required to abolish those tariffs and convert to private contracts within six months. *See id.* at 1393.

On January 11, 1985, MCI petitioned for review.[3] We stayed the challenged Commission action and have considered this case on an expedited basis. *See supra* p. 1. In the discussion that follows, we explain why MCI's petition is timely and why, in obedience to the basic statutory command at stake, we vacate the *Sixth Report*.

II. Discussion

A. *Timeliness*

The *Sixth Report* was published in the *Federal Register* on January 10, 1985, and MCI filed its petition for review on January 11, 1985, at the very start of the sixty-day period for review petitions. *See* 47 U.S.C. § 402(a) (1982). The Commission concedes that MCI can challenge the *Sixth Report*, but argues that MCI cannot reach beneath the surface of that action to question the basic forbearance decision. MCI centrally maintains that section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1982), imposes an obligation on common carriers to file tariffs; the FCC, citing that central argument, insists that MCI, a party to the entire rulemaking proceeding, was "aggrieved" by the initial, 1982 forbearance decision and should have challenged the *Second Report*.

[3] This court dismissed an earlier petition for review as prematurely filed. MCI Telecommunications Corp. v. FCC, No. 84-1575 (D.C.Cir. Mar. 12, 1985).

That report, as we recounted earlier, provided for *permissive* forbearance limited to resellers of basic services. If the *Second Report* was not enough, then at least when forbearance was extended to MCI in the *Fourth Report*, the Commission contends, MCI should have petitioned for review. The *Fourth Report*, we have already observed, extended *permissive* forbearance to specialized common carriers, including MCI. We reject the Commission's door-closing argument as inconsistent with our precedent and with a sensible scheme of judicial review.

In a pathmarking decision on the timeliness of review applications, *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C.Cir.1958), *cert. denied*, 361 U.S. 813, 80 S.Ct. 50, 4 L.Ed.2d 60 (1959), this court stated:

> As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.

Id. at 546. Recently, in *Montana v. Clark*, 749 F.2d 740 (D.C.Cir.1984), we reaffirmed "that an agency decision not to amend long-standing rules after a notice and comment period is reviewable agency action." *Id.* at 744. The district court in that case had erroneously read *Natural Resources Defense Council v. NRC*, 666 F.2d 595 (D.C.Cir.1981), as establishing a sweeping rule that all would-be petitioners must come to court at the moment a first cloud appears. We clarified in *Montana*:

To permit any complainant to restart the limitations period by petitioning for review of a rule, the *NRDC* court recognized, would eviscerate the congressional concern for finality embodied in time limitations on review.

This concern is not present in the instant case. Montana did not contrive to restart the 60-day period by unilaterally seeking repeal of a longstanding regulation. Indisputably, the agency itself initiated rulemaking procedures in 1981. It held out [an existing provision] as a proposed regulation, offered an explanation for its language, solicited comments on its substance, and responded to the comments in promulgating the regulation in its final form . . . . Unless we are to consider the notice and comment process a meaningless gesture, the [1982] order . . . reissuing [the existing provision] constitutes final agency action and is reviewable under the Administrative Procedure Act, 5 U.S.C. § 704.

749 F.2d at 744.

In this case, as in *Montana v. Clark*, the *agency* launched further rulemaking, solicited comments on the substance of a proposed rule, and responded to the comments in arriving at its final order. Rejecting a challenge to its statutory authority to eliminate common carrier tariff filing, the FCC fundamentally altered the forbearance program from a permissive to a mandatory arrangement. As MCI highlights, the permissive character of the earlier orders left carriers who wished to file tariffs free to do so and therefore at least arguably without cause for complaint. Only when the Commission turned permission into command did MCI's aggrievement become evident and plainly adequate to support a challenge to the Commission's forbearance authority.[4]

[4] While we do not reach the question whether MCI would have had standing to challenge the *Second* or *Fourth Report*, we note the Supreme Court's recent instruction in Heckler v. Chaney, —— U.S. ——, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985), that an agency's decision not to take enforcement action is presumed unreviewable under § 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1982). In this case, the Commission justified its permissive orders in part as an allocation of enforcement resources. *See Further Notice*, 84 F.C.C.2d at 454-55. Thus, until forbearance was made mandatory, the FCC's activity was arguably immune from judicial review. *But cf. Chaney*, 105 S.Ct. at 1656 n. 4 (Court did not reach "situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities").

Disapproving similar FCC argument, this court recently stated:

> Although statutory time limitations on judicial review of agency action are jurisdictional, *see Nat'l Bank of Davis v. Office of Comptroller of Currency*, 725 F.2d 1390, 1391 n. 1 (D.C.Cir.1984) (*per curiam*), self-evidently the calendar does not run until the agency has decided a question in a manner that reasonably puts aggrieved parties on notice of the rule's content.
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> . . . .
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> . . . It would be patently unfair to hold that an agency's *entirely unspoken* (or impenetrably obscure) belief that Proposition B follows from Holding A may be the basis for precluding judicial review of Proposition B simply because the party aggrieved participated in the administrative proceeding that resulted in Holding A. Yet that is precisely what the FCC asks this court to do.

RCA Global Communications, Inc. v. FCC, 758 F.2d 722, 730-31 (D.C.Cir.1985). As in *RCA Global*, "we reject that effort," *id. at* 731, and now turn to the merits of MCI's contention that the Commission lacks statutory authority to prohibit common carrier tariff filings.

B. *Statutory Authority*

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980); *see National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1201 (D.C.Cir.1984) ("[T]he language of the statute [is] the proper starting point for both agencies and courts as they struggle to sort out the complex and often elusive responsibilities that Congress has delegated to them."). We therefore set out immediately the statutory provision on which MCI rests its case. Section 203(a) of the Communications Act provides:

> *Every* common carrier, except connecting carriers, *shall*, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges.

47 U.S.C. § 203(a) (1982) (emphasis added). "Shall," the Supreme Court has stated, "is the language of command," *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 820, 79 L.Ed. 1566 (1935); "[a]bsent a clearly expressed legislative intention to the contrary," courts ordinarily regard such statutory language as conclusive. *GTE Sylvania*, 447 U.S. at 108, 100 S.Ct. at 2056; *see, e.g., Amalgamated Transit Union v. Donovan*, 767 F.2d 939, 944 (D.C.Cir.1985).

The FCC counters with a further statutory provision, section 203(b)(2) of the Communications Act, 47 U.S.C. § 203(b)(2) (1982), and contends that its "plain meaning" permits the Commission to order the forbearance at issue. *See Sixth Report*, 57 RAD.REG.2d at 1398 (section 203(b)(2) "gives the Commission the express authority to exempt carriers from tariff filing requirements where appropriate"). Section 203(b)(2) provides:

> The Commission may, in its discretion and for good cause shown, *modify* any requirement made by or under the authority of this section either in *particular instances* or by general order applicable to *special circumstanuces or conditions* except that the Commission may not require the notice period . . . to be more than ninety days.

47 U.S.C. § 203(b)(2) (emphasis added).

The words "modify . . . in particular instances or by general order applicable to special circumstances or conditions" suggest circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement. *See, e.g.*, BLACK'S LAW DICTIONARY 905 (5th ed. 1979) ("modify" defined as "[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce"). Our resistance to the uncommon meaning the Commission currently reads into its "particular instances" and "special circumstances" modification authority is strengthened by precedent closely in point. We now review that precedent.

American Telephone & Telegraph Co. v. FCC, 572 F.2d 17 (2d Cir.) *(AT & T Resale), cert. denied*, 439 U.S. 875, 99 S.Ct. 213, 58 L.Ed.2d 190 (1978), involved a Commission conclusion that resellers of communications services were common carriers subject to regulation under the Communications Act. Prospective resellers challenged this determination. The challengers asserted that resellers were not common carriers; alternatively, they contended that the Commission had discretion to refrain from regulating resellers. The court upheld the Commission's ruling that resellers were common carriers subject to regulation, and then addressed the challengers' alternative contention:

> The FCC has a duty to "execute and enforce the provisions of" the Communications Act, 47 U.S.C. § 151. The Communications Act requires that com-

mon carriers furnish service on reasonable request, 47 U.S.C. § 201(a); that rates and practices be just U.S.C. § 201(a); that rates and practices be just, fair, reasonable and nondiscriminatory, 47 U.S.C. §§ 201 (b), 202(a); *that carriers file their tariffs with the FCC*, 47 U.S.C. § 203(a); that the FCC investigate complaints, 47 U.S.C. § 208; that carriers obtain certificates of public convenience and necessity before constructing, acquiring or operating any facilities or terminating any services, 47 U.S.C. § 214; that the FCC examine transactions that might affect rates or services, 47 U.S.C. § 215; and that carriers submit applications for proposed consolidations and mergers to the FCC, 47 U.S.C. § 222. *We are aware of no authority for the proposition that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met.*

Id. at 25 (emphasis added). Even closer to home, in *American Telephone § Telegraph Co. v. FCC*, 487 F.2d 865 (2d Cir.1973) (*AT & T Special Permission*), the court addressed the limits of the Commission's discretion under section 203(b)(2):

> [W]e think that a proper interpretation of Section 203 (b) indicates that it does not authorize the Commission to circumvent statutory limitations upon its authority imposed by other sections of the Act. Since Section 203(b) only permits modification of "the requirements made by or under the authority of this section," the Commission may not rely upon this section to circumvent the requirements of Sections 204 and 205 relating to the limitation of the suspension period and the prescription procedure. In short, under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty days notice provision.

Id. at 879.

Counsel for the Commission conceded at oral argument that the FCC has arrived at its fully expanded view of section 203(b)(2) rather lately. By contrast, shortly after the Commission opened its *Competitive Carrier* inquiry, the agency stated in *Western Union Telegraph Co.*, 75 F.C.C.2d 461 (1980):

> There can be no question that tariffs are essential to the entire administrative scheme of the Act. They serve as a kind of "tripwire" enabling the Commission to monitor the activities of carriers subject to its jurisdiction and to thereby insure that the charges, practices, classifications, and regulations of those carriers are just, reasonable, and nondiscriminatory within the meaning of Sections 201 and 202 of the Act. The importance of tariffs and the requirement that common carriers—*all common carriers—must offer all of their communications services to the public through published tariffs* is well established. *See Armour Packing Company v. United States*, 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681 (1908).

Id. at 474 (emphasis added). Harmoniously, the FCC had informed the Second Circuit through the Commission's brief in *AT & T Resale*:

> As to the law, it is plainly wrong to suggest that the Commission could leave resale entities unregulated altogether. *The Commission has affirmative commands from Congress* to ensure that rates are just, reasonable and nondiscriminatory, Sections 201, 202; *that rates and practices are set forth in tariffs filed with the FCC, Section 203;* and that carriers obtain certificates of public convenience and necessity before obtaining facilities and putting them in operation, Section 214.
>
> *The agency has no authority to ignore these commands, even if market forces arguably are present which undercut the "natural monopoly" justification*

> *for regulation.* This much is clear from *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974), where the Supreme Court held that the FPC lacked the authority to leave natural gas rates entirely to the marketplace in abdication of its statutory responsibility to ensure that rates are just and reasonable.

Brief of Federal Communications Commission at 49-50, *AT & T Resale* (emphasis added), *quoted in* Reply Brief for Petitioner MCI Telecommunications Corporation at 12.

In short, at least until 1980, the Commission shared, indeed fostered, the judicial perception of the statutory tariff-filing requirement for common carriers. The requirement could be modified by administrative action, the FCC once understood, but not removed in gross by agency order. We hold that the Commission's prior comprehension of the meaning section 203 will bear was correct, and that the FCC's new view departs from any plausible reading of the statute's text.

As a second line of argument in support of the *Sixth Report*, the Commission asserts general authority to forbear from full Title II common carrier regulation in order to adapt its superintendence to changing circumstances as "the public interest" indicates. The FCC relies principally on four decisions to back up the asserted general authority; *Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir.1984); *Computer & Communications Industry Association v. FCC*, 693 F.2d 198 (D.C.Cir.1982), *cert. denied*, 461 U.S. 938, 103 S.Ct. 2109, 77 L.Ed.2d 313 (1983); *Western Union Telegraph Co. v. FCC*, 674 F.2d 160 (2d Cir.1982); and *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C.Cir.1966). These decisions lack the breadth that the FCC attributes to them. They provide no warrant for erasing the congressional instruction in section 203(a) that *every* common carrier *shall* file tariffs.

Wold Communications upheld the Commission's decision to allow the sale of certain discrete satellite transponders on a noncommon carrier basis. The FCC isolates and quotes this court's statement that "the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances." 735 F.2d at 1475. The "appropriate circumstances" in *Wold* included the Commission's representation that it had made "a modest adjustment" and had not "displaced regulated common carrier service as the dominant mode." *Id.* at 1468. The "limited departure from the status quo" approved in *Wold*, *id.* at 1469, concerned "noncommon carrier offerings," *id.* at 1474, and did not implicate, as this case does, "unfettered discretion to regulate or not [] regulate common carrier services." *Id.* at 1475 (quoting *Computer & Communications Industry Association*, 693 F.2d at 212).

Computer & Communications Industry Association held reasonable "[t]he Commission's finding that enhanced services and CPE [customer premises equipment] are not common carrier communications activities within Title II." 693 F.2d at 209. Similarly, *Western Union* upheld the Commission's decision to detariff terminal equipment, based on the FCC's reasonable conclusion that the sale or lease of that equipment was not a communications service. 674 F.2d at 165. *Philadelphia Television* also involved regulation—there of community antenna television (CATV)—of noncommon carrier activity:

> [The Commission's] holding that CATV systems are not common carriers thus comes before us in a context of regulation . . . under different provisions of the Communications Act. In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to *some leeway* in choosing which jurisdictional base and

> which regulatory tools will be most effective in advancing the Congressional objective.

359 F.2d at 284 (emphasis added).

In this case, the services provided by the non-dominant carriers remain common carrier services. Indeed, at an earlier stage of the *Competitive Carrier* rulemaking the Commission apparently rejected a definitional approach. *See Second Report*, 91 F.C.C.2d at 61-62 & n. 7. Therefore, decisions that depend on classification of the service or operation in question as outside the common carrier context will not travel the distance the Commission would take them.

Finally, the Commission urges that the *Sixth Report* orders an altogether rational regulatory reduction because "competitive marketplace forces in almost all cases will be sufficient to assure just and reasonable rates." Brief for Respondents at 51.

However reasonable the Commission's assessment, we are not at liberty to release the agency from the tie that binds it to the text Congress enacted. Significantly, the Commission's search for support leads it to decisions upholding the exemption of certain airline, railroad, and trucking services from tariff filing requirements—cases in which Congress had supplied explicit deregulatory authority.

In *Central & Southern Motor Freight Tariff Association v. United States*, 757 F.2d 301 (D.C.Cir.1985) (per curiam), for example, we upheld Interstate Commerce Commission orders exempting motor contract carriers of property from the tariff filing requirements of the Motor Carrier Act, 49 U.S.C. §§ 10,101-11,917 (1982). We relied on the

> sweeping text of the statutory exemption provisions. These provisions uniformly sanction relief "when relief is consistent with the public interest and the transportation policy of section 10101 of this title."

> The original provisions—whose substance continues in force despite the semantic changes wrought by the 1978 recodification—stressed the breadth of the Commission's discretion by stating that "the Commission may . . . grant such relief *to such extent and for such time, and in such manner as in its judgment* is consistent with the public interest and the [national transportation] policy." What we have, to use the Fifth Circuit's words, is a congressional charge to "go forth and do good." The delegation to the Commission is as broad as Congress could make without giving the Commission carte blanche.

Id. at 314-15 (footnotes omitted).

Similarly, *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819 (D.C.Cir.1980), upheld detariffing domestic air cargo carriers based on sweeping changes Congress made in the regulatory regime:

> Section 416(b) and 418(c) grant the Board very broad discretion. The latter authorizes the Board to exempt all-cargo carriers from "*any* * * * section of this chapter which the Board by rule determines appropriate * * *." 49 U.S.C. § 1388(c) (Supp. I 1977) (emphasis added). The former permits the Board to exempt "any person or class of persons" from "*the requirements of this title* or *any* provision thereof * * * if it finds that the exemption is consistent with the public interest." Pub.L. No. 95-504 § 31(a) (emphasis added). Thus, as petitioners concede, the plain language of the statute authorizes the Board's action.

Id. at 827.

Brae Corp. v. United States, 740 F.2d 1023 (D.C.Cir. 1984) (per curiam), *cert. denied*, —— U.S. ——, 105 S.Ct. 2149, 85 L.Ed.2d 505 (1985), upheld deregulation of freight boxcar rates. In the Staggers Act, Congress stated:

> In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission *shall* exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—
>
> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10,505(a) (1982) (emphasis added). We sought to follow the congressional lead:

> Congress itself has found that the structure of the transportation industry has changed so that "many of the Government regulations affecting railroads have become unnecessary and inefficient," . . . and has furthermore commanded the Commission to remove by exemption "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers." . . . Given that explicit congressional mandate, we do not believe the Commission need as exhaustively review and explain away its original justifications for abandoned regulations as if it were operating under the same statute it always had.

740 F.2d at 1038.

Perhaps most tellingly, Congress has armed the FCC, in the Record Carrier Competition Act of 1981, Pub.L. No. 97-130, § 2, 95 Stat. 1687, with authority of the kind the Commission would exercise here without statutory change. In the Record Carrier legislation Congress instructed:

> The Commission shall to the *maximum extent feasible*, promote the development of fully competitive domestic and international markets in the provision of record communications service, so that the public may obtain record communications service and facilities (including terminal equipment) the variety and price of which are governed by competition. In order to meet the purposes of this section, the Commission *shall* forbear from exercising its authority under [Title II of the Communications Act] as the development of competition among record carriers reduces the degree of regulation necessary to protect the public.

47 U.S.C. § 222(b)(1) (1982) (emphasis added); *see RCA Global Communications, Inc. v. FCC*, 758 F.2d 722 (D.C.Cir.1985).

But Congress has not given the FCC new instruction for the case at hand. As the Second Circuit stated in *AT & T Special Permission*:

> In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.

487 F.2d at 880 (footnote omitted). In sum, if the Commission is to have authority to command that common carriers not file tariffs, the authorization must come from Congress, not from this court or from the Commission's own conception of how the statute should be rewritten in light of changed circumstances.

CONCLUSION

For the reasons stated, we vacate the Commission's decision prohibiting common carriers from filing tariffs. In so ruling, we do not reach the question whether the the FCC's earlier permissive orders are invalid.[5] We note that the Commission could further streamline the regulation of non-dominant carriers without encountering any contrary congressional prescription. *See Sixth Report*, 57 RAD.REG.2d at 1395-96. But to proceed in the manner ordered by the *Sixth Report*, the Commission, in our view, must obtain leave of Congress. We may interpret the FCC's authority generously, but we are not positioned to confer upon the agency "unfettered discretion to regulate or not regulate common carrier services." *Computer & Communications Industry Association*, 693 F.2d at 212.

The order under review is vacated and the case is remanded to the Commission for further consideration and action consistent with this opinion.

It is so ordered.

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[5] *See supra* note 4.

(10)

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No. 93-356

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

Petitioner incorporates by reference the Rule 29.1 statement set forth in the Petition for Certiorari.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

1. The need for immediate plenary review is clear. Until overturned by the D.C. Circuit in 1992, permissive detariffing had served for ten years as a cornerstone of the FCC's efforts to improve service and lower prices for long-distance service. The United States agrees that the D.C. Circuit's judgment warrants review.[1] This plea has been joined by sophisticated telecommunications consumers like IBM,[2] and by leading industry associations representing carriers that are, as a result of permissive detariffing, now seeking to bring competition to local telephone markets dominated by the Bell Operating Com-

[1] *See* Petition for certiorari in No. 93-521.

[2] *See Brief Amicus Curiae* of International Business Machines Corporation (filed in Nos. 93-356, 93-521).

panies.[3] AT&T's long-distance competitors also uniformly support review because of "the overwhelming importance of this matter to the Nation's ongoing transition from monopoly to competitive telecommunications markets."[4] As these parties and *amici* have recognized, the D.C. Circuit's ruling will "radically alter the marketplace for telecommunications services and, in turn, handicap the competitiveness of businesses that depend on such services" by removing "an essential element of the highly successful, established regulatory policy on which important investment and business decisions have been based" for a decade.[5]

AT&T concedes as much. In particular, AT&T raises no challenge to the FCC's conclusion that competition constrains nondominant carriers from unreasonable or discriminatory pricing, and thereby acts as an efficient, welfare-enhancing substitute for burdensome regulation. Nor does AT&T contend that permissive detariffing has harmed the intended beneficiaries of tariff regulation—consumers. To the contrary, AT&T enthusiastically endorsed these conclusions in a recent FCC filing, and asked that the benefits of tariff deregulation be extended to it.[6] Even the

[3] *See* Joint Brief of Respondents Association for Local Telecommunications Services, *et al.* (filed in No. 93-521).

[4] Brief *Amici Curiae* of WilTel, Inc., LDDS Communications, Inc. d/b/a LDDS Metromedia Communications, Cable & Wireless Communications, Inc., Chadwick Telecommunications Corp., American Network Exchange, Inc., KLP, Inc. d/b/a Call America, Capital Network System, Inc., Impact Telecommunications Corp., LCI International, Inc., One-2-One Communications, Inc., and Telephone Electronics Corp. (filed in No. 93-521), at 3. *See also* Joint Brief of Respondents Association for Local Telecommunications Services, *et al.* (filed in No. 93-521) at 6 (D.C. Circuit invalidated "an agency policy of unquestioned soundness and central to the agency's goal of promoting competition").

[5] IBM *Amicus* Brief, at 10, 11.

[6] Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, filed September 22, 1993 in

D.C. Circuit did "not quarrel with the Commission's policy objectives." Pet. App. 54a. There is thus no dispute that the D.C. Circuit's ruling will shackle the FCC, the telecommunications industry, and the public to obsolete and burdensome tariff rules.

2. The D.C. Circuit's sole justification for imposing such a harmful and disruptive result—the conclusion that permissive detariffing is beyond the FCC's statutory authority under Section 203(b), *see* Pet. App. 54a—rests on a perfunctory statutory analysis that AT&T makes no serious effort to defend. Instead, AT&T spends page after page arguing that the D.C. Circuit's ruling was "compelled by this Court's decision three years ago in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)." *See* AT&T Opp. at 7. *Maislin*, however, has nothing to do with the question presented here.

a. *Maislin* did not arise under the Communications Act, but under the Interstate Commerce Act. The case

Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, at 16-17:

> As the Commission recognized at the outset of this docket, and reaffirmed only months ago, carriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably. The pricing of their services is effectively constrained by market forces: if such carriers sought to charge supracompetitive rates, or discriminate unreasonably, customers would simply move to other carriers; and carriers that attempt to charge prices below cost would generate losses that could never be recouped. . . .
>
> In these circumstances, no legitimate purpose is served by . . . subjecting AT&T to direct economic regulation. To the contrary, such regulation "imposes barriers and burdens [that] impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs," as the Commission has found. . . . Thus, direct economic regulation is not merely unnecessary; it impedes the "dynamism" of a competitive market and "impose[s] both direct and indirect costs on users." (quoting 6 FCC Rcd. at 5895).

did not involve the scope of the Interstate Commerce Commission's authority to promulgate rules modifying tariff filing requirements. Rather, *Maislin* involved the different question whether, absent any modification of the statutory tariff requirement, the ICC could retroactively excuse a carrier that had charged a rate other than a previously tariffed rate for the service at issue. The ICC made no claim in *Maislin* that its statutory modification authority justified retroactive approval of departures from previously tariffed rates. And the Court merely held—over a sharp dissent by Justice Stevens (joined by the Chief Justice)—that the ICC may not approve a carrier's departure from a rate it has previously filed for a particular service. Thus, *Maislin* in no way "compels" the D.C. Circuit's crabbed reading of Section 203 of the Communications Act.[7]

Even if *Maislin* had defined the scope of the ICC's delegated power to modify statutory tariff requirements, that decision would not diminish the need for plenary review in this case. Section 203 of the Communications Act is worded differently from its ICA counterpart in critical respects. *See* MCI Petition at 21-23. In particular, the "filed rate" requirements of the Communications Act—unlike their ICA counterparts in 49 U.S.C. § 10761—are expressly conditioned on the potential exercise of the Commission's authority to "modify any requirement" of Section 203.

The first clause of Section 203(c) states that "[n]o carrier, *unless otherwise provided by or under authority of this chapter*, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder." 47 U.S.C. § 203 (emphasis added). On its face, this language plainly contemplates

[7] It is telling that *Maislin*—which AT&T now claims "compelled" the result below—was mentioned only in passing in a footnote in the D.C. Circuit's analysis of Section 203. *See* Pet. App. 53a.

that service may be provided without filing schedules (tariffs) if the FCC "otherwise provide[s] . . . under authority of this chapter." The remaining provisions of Section 203, which prohibit particular departures from tariffed rates, each expressly refer back to the basic tariff requirement of the first sentence of Section 203(c).[8] Thus, the "filed rate" requirements of Section 203(c) are plainly *conditional*. They apply whenever the basic requirement of the first sentence of Section 203(c) applies. However, they do not apply if the FCC has "otherwise provided" for untariffed service pursuant to its Section 203(b)(2) powers.

Because the ICA counterpart of Section 203(c)—49 U.S.C. § 10761—is not similarly conditioned on the ICC's exercise of its modification power, Section 203 must be understood to authorize permissive detariffing irrespective of the scope of the ICC's authority. The "filed rate" doctrine on which AT&T places so much reliance is therefore different under the Communications Act. Given this critical distinction, the Court's ruling in *Maislin* cannot possibly obviate the need for review here.

[8] Section 203(c)(1) states that no carrier shall "charge, demand, collect or receive a greater or less or different compensation for such communication . . . between the points named in *any such schedule*." Section 203(c)(2) states that a carrier may not "refund or remit . . . any portion of the charges *so specified*." And Section 203(c)(3) states that a carrier may not "extend to any person any privileges or facilities in such communication . . . except as specified in *such schedule*." Each of the specific statutory components of Section 203(c)'s "filed rate" requirement thus proceeds expressly from the first sentence of Section 203. The "schedules" to which these provisions refer are the schedules required by the first sentence of Section 203(c). Because the first sentence contemplates that untariffed service may be provided in some instances "under authority of this chapter," the "filed rate" requirements of Section 203(c) are plainly conditional. They apply unless the FCC has otherwise authorized untariffed service pursuant to its Section 203(b)(2) powers.

b. Moreover, the *stare decisis* considerations that dictated the result in *Maislin* are wholly absent in this case. As AT&T notes, the *Maislin* Court held that "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of a statute against our prior determination of the statute's meaning." 497 U.S. at 131. Because prior Supreme Court precedent interpreting the ICA had conclusively determined that motor carriers could not depart from previousiy filed rates, the ICC was not free in *Maislin* to advance a different reading of the filed rate requirement. This principle applied even though the precedent predated *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and thus did not analyze the issue according to the principles set forth in that decision.

This Court has never rendered similar binding interpretations of Section 203(b) of the Communications Act. For this reason, AT&T's *stare decisis* arguments are entirely beside the point. In fact, *stare decisis* considerations make immediate plenary review all the more important. Though not binding on this Court, the *stare decisis* effect of the decisions at issue here will constrain future D.C. Circuit panels interpreting the scope of the FCC's modification authority under Section 203(b). Because all FCC rules may be challenged in the D.C. Circuit, the rulings at issue here may well deter the FCC from even attempting innovative responses to changes in the telecommunications marketplace. *See* page 9 *infra*.

3. AT&T's limited textual analysis of Section 203 does not begin to address the arguments advanced in the petitions for certiorari. AT&T does not dispute that the ordinary meaning of the operative statutory phrase "modify any requirement" comfortably encompasses the power to authorize permissive detariffing. *See* MCI Petition at 16-17; U.S. Petition at 10-11. Instead, AT&T offers an *ipse dixit*. "In this context," AT&T claims, the word modify

"is 'defined as "[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce." ' " AT&T Opp. at 15 (quoting *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985) (quoting *Black's Law Dictionary* 95 (5th ed. 1979))). But AT&T makes no effort to explain why the word "modify" must "in this context" take the narrowest available dictionary definition, which the D.C. Circuit imposed, rather than the broader and more natural alternative definitions identified in the petitions for certiorari. AT&T likewise makes no effort to reconcile the D.C. Circuit's ruling with this Court's clear statement in *National R.R. Passenger Corp. v. Boston & Maine Corp.*, that the mere "existence of alternative dictionary definitions . . . each making some sense under the statute, itself indicates that the statute is open to interpretation," and thus that *Chevron* deference is mandatory. 112 S. Ct. 1394, 1402 (1992).[9]

Nor can AT&T reconcile its position with the language of Section 203(c)—a provision ignored by the D.C. Circuit in each of its rulings. As demonstrated, *see* page 5 & n.8 *supra*, Section 203(c) plainly contemplates that carriers can be authorized to provide service without filing a tariff. Thus, all available textual evidence indicates that Congress understood it was empowering the FCC to remove tariff requirements.

There is simply no basis for refusing to defer to the FCC in this case. It is implausible to argue that Congress has "directly addressed the precise question at issue." *Chevron*, 467 U.S. at 842-43; *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 647-48 (1990). To the

[9] Recognizing the inherent ambiguity of the term "modify," this Court held in *Chemical Manufacturers' Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985), that EPA's construction of a provision of the Clean Water Act providing that the "Administrator may not modify any requirement of this section" was entitled to *Chevron* deference. 470 U.S. at 125-26.

contrary, Section 203(b) reflects an express congressional decision to delegate to the FCC the power to set tariff policy according to the FCC's view of the public interest. *See United States v. Morton*, 467 U.S. 822, 834 (1984) (deference particularly appropriate where "Congress explicitly delegated authority" to agency). The tariff issues involved here are highly technical and at the core of the agency's expertise. *Chevron*, 467 U.S. at 844; *Chemical Manufacturers*, 470 U.S. at 125; *NLRB v. United Food and Commercial Workers*, 484 U.S. 112, 128 (1987). The delegation in Section 203(b) is consistent with the overall scheme of the Communications Act, which has long been recognized as "a supple instrument for the exercise of discretion by an expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). And Congress has ratified the FCC's permissive detariffing rule. *See* MCI Petition at 19-20.[10] For all these reasons, judicial deference should have been at its zenith. AT&T's suggestion that permissive detariffing requires present congressional approval is thus completely inappropriate.

4. There is no merit to AT&T's contention (AT&T Opp. at 14) that certiorari should be denied because the courts of appeals have given a uniform answer to the question presented. The D.C. Circuit is the only court of appeals to have considered that question. And, as demonstrated, the issue has never been fully considered under applicable law even in the D.C. Circuit. *See* MCI Petition at 16. The two Second Circuit decisions cited by

[10] AT&T's challenge to Congress's ratification of permissive detariffing is meritless. AT&T notes that TOCSIA was not intended to "alter" any obligations under other sections of the Communications Act. AT&T Opp. at 17-18. But petitioners do not contend that TOCSIA altered the scope of the FCC's Section 203(b) modification power. Rather, petitioners contend that the FCC's permissive detariffing rules, which were promulgated well before TOCSIA and were well known to Congress, constitute a *correct* interpretation of Section 203(b), and that Congress's action in TOCSIA signals agreement with the FCC's interpretation.

AT&T, *see* AT&T Opp. at 14, do not remotely raise the question presented here. In *AT&T v. FCC*, 572 F.2d 17, 25 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978), the Second Circuit affirmed the FCC's decision that it should not exempt "resellers" from *all* common carrier regulation. The FCC had not invoked Section 203(b), and the case raised no issue respecting the proper scope of the FCC's Section 203(b) modification power. In *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973), the Second Circuit held that Section 203(b) did not authorize the FCC to alter requirements independently imposed by Sections 204 and 205 of the Act. The case did not raise any question respecting the scope of the FCC's power to modify the tariff requirements of Section 203 itself.[11] Indeed, far from demonstrating uniformity, Second Circuit law squarely rejects the central premise of AT&T's brief in opposition. The Second Circuit has held that, in enacting Section 203(b), "the congressional intent was not to provide a carbon copy of the Interstate Commerce Act." *AT&T v. FCC*, 503 F.2d 612, 616 (2d Cir. 1974).

5. Although AT&T suggests that plenary review is premature because AT&T's challenge to the FCC's *Range Tariff Order* is presently before the D.C. Circuit (AT&T Opp. at 20-22), the pendency of that case points up the need for immediate review in this case. The FCC expressly adopted the *Range Tariff Order* as a fallback, after the D.C. Circuit invalidated permissive detariffing in the rulings under review here. AT&T is presently challenging the *Range Tariff Order* on the ground that the very D.C. Circuit rulings at issue before this Court foreclose any argument that the *Range Tariff Order* is a permissible exercise of the FCC's Section 203(b) modification power. AT&T's argument makes clear that the rul-

[11] 487 F.2d at 879 ("Since Section 203(b) only permits modification of 'the requirements made by or under the authority of this section,' the Commission may not rely upon this section to circumvent the requirements of Sections 204 and 205 relating to the limitation of the suspension period and the prescription procedure.").

ings at issue in these petitions will constrain the D.C. Circuit's future rulings as to the legality of FCC tariffing policies, and are certain to inhibit the development of tariffing policies the FCC with good reason believes to be in the public interest.

Respectfully submitted,

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL BUSINESS MACHINES CORPORATION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, International Business Machines Corporation ("IBM") respectfully submits this corporate disclosure statement.

IBM is a manufacturer of equipment used with telecommunications services and is a user of such services. IBM has no parent companies, subsidiaries, or affiliates as those terms are used in Rule 29.1.

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL BUSINESS MACHINES CORPORATION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI[1]

IBM respectfully supports the petitions of the United States and the Federal Communications Commission and MCI Telecommunications Corporation for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision of that court in *American Tel. & Tel. Co. v. FCC*, No. 92-1628 (D.C. Cir. June 4, 1993).

[1] Pursuant to Rule 37.2, *amicus curiae* has obtained the written consent of all parties to the filing of this brief.

INTEREST OF AMICUS CURIAE

IBM is a manufacturer of equipment used with telecommunications services and is a substantial user of such services. In both capacities, IBM has a significant interest in the maintenance of a competitive marketplace for telecommunications services. The Federal Communications Commission's forbearance policy (or "permissive detariffing") at issue in this case has proven an effective means of promoting competition in telecommunications services. In reliance on the forbearance policy, IBM has structured its business dealings and made investment decisions on the assumption that the marketplace for telecommunications services would remain and, indeed, become increasingly competitive. IBM participated in the Commission's rulemaking proceeding in which the forbearance policy was reaffirmed. The ruling of the court below would invalidate the Commission's decision.

SUMMARY OF ARGUMENT

This case merits certiorari because the court below substituted its judgment for that of the Commission regarding an ambiguous statutory term in direct contravention of this Court's *Chevron* decision.[2] Certiorari also is appropriate because the issue presented -- the lawfulness of the Commission's longstanding forbearance policy -- has not been resolved by this Court and is of fundamental importance to providers of telecommunications services, manufacturers of telecommunications equipment, and users of the telecommunication system.

The charter of the Federal Communications Commission is "to make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities

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[2] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

at reasonable charges."[3] To implement that mandate, over the last fifteen years the Commission developed a regulatory structure designed to encourage competition in the telecommunications marketplace. A cornerstone of this structure is the Commission's permissive detariffing policy. Under that policy, carriers found to face effective competition may charge prices that have not been incorporated in tariffs filed with the Commission. In the decision below, the U.S. Court of Appeals for the District of Columbia Circuit held this policy to be unlawful. That decision is in direct conflict with this Court's ruling in *Chevron*.

The Commission's interpretation, if not compelled, is at least "permissible" and, as such, is due considerable deference by a reviewing court under *Chevron*.[4] Under the express authority of Section 203(b)(2) of the Communications Act, the Commission may "modify any requirement" of Section 203. The Commission has, in its expert discretion, concluded that its power to modify includes the power to forbear from applying the provisions of Section 203(a), which govern the filing of tariffs by common carriers. This interpretation is consistent with the text of the statute. The lower court's failure to afford due deference to the Commission's interpretation constitutes a fundamental error of administrative law.

The court below decided a question of federal law that is important to carriers, resellers, and users of telecommunications services that has not been, but should be, resolved by this Court. Under permissive detariffing, competition in the telecommunications market has flourished. This competitive environment both has encouraged the development of the most advanced telecommunications sector in the world and, at the same time, has helped ensure that rates remain just and reasonable. The advanced

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[3] 47 U.S.C. § 151.

[4] *Chevron*, 467 U.S. at 843.

telecommunications services elicited by this competitive marketplace have boosted the competitiveness of U.S. industries in international markets.

Certiorari is appropriate here because the lower court's decision, which would require common carriers and hundreds of resellers to file public tariffs, would significantly inhibit competition in the telecommunications industry. Where a monopoly exists, tariffs can be an effective means of protecting consumers and preventing monopolistic abuses. By contrast, if a marketplace is subject to effective competition, tariffing is unnecessary because competitive forces restrain prices. Tariffing also tends to impede the workings of a market. Tariffing imposes additional costs on sellers, inhibits their competitive responses to market trends, and actually creates a risk of collusive pricing. If the decision below is allowed to interpose these impediments to competition in telecommunications, the vitality of the U.S. telecommunications industry will be reduced. That in turn will reduce the competitiveness of other American industries that rely on a competitive telecommunications marketplace.

Important investment and business decisions have been made in reliance on the policy that the lower court's decision would invalidate. Telecommunications users such as IBM have structured their businesses around contracts negotiated with service providers or resellers in a competitive environment. The decision of the court below shrouds the lawfulness of these contracts in uncertainty. Moreover, in future service agreements, market participants would incur significant transaction costs if they had to anticipate and adjust to the more restrictive environment that the decision below would create.

In sum, contrary to the *Chevron* doctrine, the court below invalidated the Commission's permissive detariffing rules. The question of validity of those rules is of great importance to the telecommunications industry and its

customers. The question has not been, but should be, resolved by this Court.

ARGUMENT

I. *In Rejecting the Commission's Reasonable Interpretation of Its Governing Statute, the Decision Below Conflicts with the Ruling of This Court in Chevron.*

This case turns on the meaning of Section 203(b)(2) of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, (the "Act"), which allows the Commission to "modify any requirement made by or under the authority" of Section 203. The Commission has interpreted this section to empower it to make tariff filing permissive for nondominant common carriers.[5] The court below disagreed.[6] As set forth more fully in the petitions for

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[5] *Policy and Rules Concerning Rates and Facilities for Competitive Carrier Services Therefor, Notice of Proposed Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979), *First Report and Order*, 85 F.C.C.2d 1 (1980), *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445 (1981) ("*Competitive Carrier Further Notice*"), *Second Report and Order*, 91 F.C.C.2d 59 (1982) ("*Competitive Carrier Second Report*"), *recon.*, 93 F.C.C.2d 54 (1982), *Second Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 17,308 (1982), *Third Further Notice of Proposed Rulemaking and Third Report and Order*, 48 Fed. Reg. 46,791 (1983), *Fourth Report and Order*, 95 F.C.C.2d 554 (1983) ("*Competitive Carrier Fourth Report*"), *Fourth Further Notice of Proposed Rulemaking*, 96 F.C.C.2d 922 (1984), *Fifth Report and Order*, 98 F.C.C.2d 1191 (1983), *recon.*, 59 Rad. Reg.2d 543 (1985), *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), *vacated and remanded sub nom., MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) ("*MCI v. FCC*").

[6] The court below disposed of the present case by summary order on the ground that the court's earlier decision in *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) ("*AT&T v. FCC*"), *cert. denied*. 113 S. Ct. 3020 (1993), conclusively determined the outcome of the dispute. In the earlier case, the lower court concluded that the Commission's argument in support of permissive detariffing was foreclosed by the analysis in *MCI v. FCC*, 765 F.2d at 1186, in which the court held *mandatory* detariffing unlawful under the Act. However, in

certiorari of the United States and MCI, the lower court violated the principles articulated in *Chevron* by substituting its judgment for that of the expert agency charged with enforcing the Act.

To begin with, the lower court's decision is based on an overly narrow construction of Section 203(b)(2). In that section, Congress provided the Commission with authority to modify "any" requirement of Section 203 save one: The Commission "may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." 47 U.S.C. § 203(b)(2). The normal inference from the existence of a specific exception to a statutory command is that there are no other exceptions.[7] This inference is buttressed in this case by the expansive language Congress used in conferring the modification authority. Pursuant to Section 203, the Commission may modify "any" requirement in the section at "its discretion." The lower court's conclusion that this authority does not include the power to forbear from applying the tariff filing requirement in certain cases is entirely inconsistent with the statutory language.

Despite the sweeping language of the statute, the court below substituted its own cramped interpretation of Section 203(b)(2) for that of the expert agency charged with implementing the Act. Thus, this presents a quintessential *Chevron* case.[8] The Commission's construction of Section 203(b)(2) is certainly a reasonable one, given the

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MCI the court had expressly declined to reach the question whether the permissive detariffing orders were invalid. *See id.* at 1196. Thus, far from foreclosed by the court's earlier decisions, the Commission's permissive detariffing policy and its underlying rationale never have been the subject of reasoned decisionmaking by any court with the benefit of full briefing and argument.

[7] *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

[8] *See Chevron*, 467 U.S. at 837.

language of the provision and the context in which it appears. Where "the statute is silent or ambiguous with respect to the specific issue," a court must defer to a "permissible" agency construction.[9] This rule reflects the Court's recognition that Congress has entrusted the administration of a regulatory statute to an expert agency, to be overridden by a court only where the agency has clearly exceeded its statutory authority. In failing to accord the Commission's interpretation due deference, the court below contravened a fundamental tenet of administrative law.[10]

II. *This Case Involves an Important Issue of Federal Law That Has Not Been, But Should Be, Resolved by This Court.*

A. Permissive Detariffing Furthers an Important Policy of the Act.

The core purpose of the Act is "to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at reasonable charges."[11] Only fifteen years ago, the monolithic, highly regulated telecommunications industry was making little prog-

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[9] *Id.* at 843.

[10] The Commission's reasonable interpretation of the statute here has been sanctioned by congressional acquiescence. The deference afforded to an agency's interpretation of its governing statute is especially great where the "agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects." *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-89 (1940)). As petitioners point out, Congress in enacting the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), indicated that it was aware of the Commission's forbearance policy and adopted amendments to Title II of the Act that are premised on the existence of that policy. *See* 47 U.S.C. § 226(h) (Supp. III 1991)(requiring certain carriers to file informational tariffs).

[11] 47 U.S.C. § 151.

ress toward that goal: Consumers had virtually no choice among carriers and service offerings; business users were limited in their ability to procure customized telecommunications services; potential competitors faced almost insurmountable barriers to entry; and service providers were restricted in their ability to offer innovative, customer-oriented products. To find a more effective means of fulfilling its statutory mandate, the Commission set out to develop a regulatory structure that would promote competition in the marketplace in order to better ensure the reasonableness of carrier rates.[12]

One cornerstone of the resulting structure is the Commission's forbearance policy.[13] Under permissive detariffing, carriers that face effective competition are not required to publish their rates in tariffs filed with the Commission. Initially, the Commission applied this policy only to resellers (entities that resell the facilities of others).[14] In 1983, the Commission extended the forbearance policy to nondominant facilities-based carriers.[15] Since that time, the telecommunications industry has been transformed. Increasingly over the last ten years, service providers, resellers, and business users alike have been free to negotiate agreements for telecommunications services so that today they are constrained only by market forces. These agreements, which allow providers to tailor their offerings to the needs of individual users, have played a key role in creating today's vibrant competitive market-

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[12] *See Competitive Carrier Further Notice*, 84 F.C.C.2d at 456, 471.

[13] *See Competitive Carrier Fourth Report*, 95 F.C.C.2d at 554.

[14] *See Competition Carrier Second Report*, 91 F.C.C.2d at 61-62 & n.7.

[15] *See Competitive Carrier Fourth Report*, 95 F.C.C.2d at 578.

place for telecommunications services and in making possible "the consumer benefits that have resulted" from it.[16]

As the Commission has found, mandatory tariffing in a fully effective marketplace would impede, rather than promote, competition. Requiring competitive sellers to file tariffs would introduce price and service rigidity by making it difficult for the sellers to respond rapidly to market forces.[17] The administrative cost associated with tariff filing would discourage market entry and inordinately burden small resellers.[18] Extending mandatory tariffing to nondominant carriers would facilitate collusive pricing practices.[19]

By contrast, permissive detariffing creates an environment in which real price and service competition may thrive. Since the introduction of permissive detariffing, competition among nondominant carriers has flourished.[20] Domestic carriers and resellers now provide inexpensive, customer-oriented telecommunications products and services nonpareil. With the benefit of these telecommunications products and services, business users have been able to enhance their competitiveness by implementing advanced

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[16] *Tariff Filing Requirements for Interstate Common Carriers* ("*Rulemaking Order*"), 7 FCC Rcd 8072, 8079 (1992).

[17] *See Competitive Carrier Second Report*, 91 F.C.C.2d at 62.

[18] *See id.* at 65.

[19] *See Competitive Carrier Fourth Report*, 95 F.C.C.2d at 556 n.3. This Court has similarly found that the advance publication of prices in a fledgling market "tends toward price uniformity" and competitive stagnation. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

[20] *See Rulemaking Order*, 7 FCC Rcd at 8079-80 (detailing expansion of nondominant interexchange carrier market); *see also Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5881 (finding that growth of competition in business services segment warrants regulatory changes), *recon.*, 6 FCC Rcd 7569 (1991), *further recon.*, 7 FCC Rcd 2677 (1992).

management practices, such as "just-in-time" inventory control and distributed information sharing. Thus, permissive detariffing significantly contributes to the efficiency of the many industries that rely heavily on telecommunications.

Likewise, permissive detariffing furthers the statutory goal of ensuring that rates remain "just and reasonable."[21] The competitive forces unleashed by the forbearance policy have driven the rates for interstate telecommunications services steadily downward.[22] In this marketplace, any firm that seeks to charge rates that are unreasonable or discriminatory is checked by the most decisive regulatory tool available: a robust competitor.

B. The Decision Below Would Cause Significant Harm to U.S. Industry.

The present case illustrates the importance of adhering to the principles articulated in *Chevron*. By substituting its judgment for that of the expert agency, the court below would radically alter the marketplace for telecommunications services and, in turn, handicap the competitiveness of businesses that depend on such services.

The Commission's rules presently characterize both facilities-based carriers and resellers as common carriers subject to regulation under Title II of the Act. Thus, not only would facilities-based carriers such as MCI or Sprint have to file tariffs, but hundreds of small resellers would also be so obliged. The burden of this obligation would fall disproportionately on the smallest providers. These service providers, who would most feel the added administrative costs, typically rely on flexibility and market responsiveness as their primary competitive weapons. Increased cost and reduced flexibility for providers would mean higher prices and more limited service options for users, across the spectrum of American industry.

In invalidating the permissive detariffing policy, the court below has removed an essential element of the highly successful, established regulatory policy on which important investment and business decisions have been based. Service providers and large telecommunications customers such as IBM have structured their businesses around existing negotiated service contracts. The lower court's decision creates uncertainty about the lawfulness of these contracts with regard both to their continuing force and the potential ramifications of their being found unlawful. Unless dispelled by this Court, such uncertainty would translate into transaction costs as market participants attempt to anticipate and adapt to the more restrictive environment the decision below contemplates.

In short, the important issue of the validity of permissive detariffing has not been, but should be, resolved by this Court.

CONCLUSION

For these reasons and those set forth in the petitions for certiorari of the United States and MCI, the petitions should be granted.

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[21] *See* 47 U.S.C. § 201(b). In appropriate circumstances, the Commission may rely on an active and competitive marketplace as a substitute for direct regulation. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981)(market forces will adequately produce diversity in entertainment programming); *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984)(market circumstances for satellite transponder service obviate direct regulation).

[22] *See Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7378 (1992), *recon.*, FCC 93-378 (released Sept. 2, 1993).

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No. 93-356

In The Supreme Court of the United States

October Term, 1993

MCI Telecommunications Corporation,
Petitioner,

v.

American Telephone & Telegraph Company,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER MCI TELECOMMUNICATIONS CORPORATION

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QUESTION PRESENTED

Whether Section 203(b)(2) of the Communications Act, which authorizes the Federal Communications Commission to "modify any requirement" of Section 203, permits the Commission to make Section 203's tariff-filing requirement optional for telephone companies that lack market power.

PARTIES TO THE PROCEEDING

The petitioner in this case is MCI Telecommunications Corporation. The petitioners in No. 93-521 are the United States of America and the Federal Communications Commission.

The respondent is the American Telephone and Telegraph Company. Other intervenors in the court of appeals were the IBM Corporation, the United States Telephone Association, Pacific Bell and Nevada Bell, the Association for Local Telecommunications Services, the Cellular Telecommunications Industry Association, US Sprint Communications Company, the Competitive Telecommunications Association, the Bell Atlantic Telephone Companies, Local Area Telecommunications, Inc., the Ad Hoc Telecommunications Users Committee, Mobile Marine Radio, and the Southwestern Bell Corporation.

RULE 29.1 STATEMENT

See Petition for Certiorari at ii.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-356

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER MCI TELECOMMUNICATIONS CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is unreported, and is reprinted at pages 1a-2a of the appendix to the petition for certiorari ("Pet. App."). The opinion invalidated a rulemaking order of the Federal Communications Commission. The Commission's rulemaking order is reported at 7 FCC Rcd. 8072 (1992), and is reprinted at Pet. App. 3a-36a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 4, 1993. The jurisdiction of this Court to review the judgment

of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

See Petition for Certiorari at 2-3.

STATEMENT OF THE CASE

At issue in this case is the scope of the Federal Communications Commission's authority to modify tariff filing requirements under Section 203 of the Communications Act of 1934, 47 U.S.C. § 203. Section 203(a) states that telephone companies shall file tariff schedules with the Commission listing the interstate services they offer and the rates for those services. Section 203(b)(2) expressly delegates to the Commission the power to "modify any requirement made by . . . this section either in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b)(2). Section 203(c) prohibits untariffed service "unless otherwise provided by or under the authority of this chapter." 47 U.S.C. § 203(c).

Invoking the authority conferred by Section 203(b)(2), the FCC modified Section 203's tariff requirements in a series of "permissive detariffing" rulemaking orders in the 1980s. Those orders made tariff filing optional for emergent "nondominant" long distance carriers such as MCI (*i.e.*, those lacking market power).[1] The Commission premised this modification on the policy judgment that "traditional tariff regulation of nondominant carriers not only was unnecessary to ensure lawful rates, but actually could be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing."[2] Recently, after a decade of successful results, the Commission reaffirmed its permissive detariffing policy for nondominant carirers in a rulemaking order released on November 25, 1992 ("*November 25th Report and Order*").[3]

[1] *See First Report and Order*, 85 F.C.C.2d 1 (1980); *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445 (1981); *Second Report and Order*, 91 F.C.C.2d 59 (1982); *Third Report and Order*, 48 Fed. Reg. 46,791 (Oct. 14, 1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983).

The D.C. Circuit, relying on decisions which predated the *November 25th Report and Order*, summarily reversed the Commission. In so doing, the court of appeals necessarily failed to consider the FCC's views in the *November 25th Report and Order* on the meaning of Section 203(b)(2) and the wisdom of the permissive detariffing policy. MCI (and the United States in No. 93-521) seek reversal of that decision.

1. Traditional Tariff Regulation of Communications Common Carriers Under the 1934 Act.

When Congress passed the Communications Act in 1934, AT&T's ownership of the vertically integrated Bell System afforded it a monopoly over telephone service in the United States. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("[t]his vast monopoly which so immediately serves the needs of the people in their daily lives must be effectively regulated").[4] Title II of the Act,

[2] *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd. 8072, 8073 (1992); Pet. App. 3a, 6a.

[3] *Id.* at 5a.

[4] As the FCC said in one of its first major investigations of the telephone industry after the passage of the Communications Act of 1934, the "Bell System has achieved its dominant position in the telephone communications field through the prevention and elimination of effective competition." *Investigation of the Telephone Industry in the United States*, H.R. Doc. No. 340, 76th Cong., 1st Sess. 146 (1939); *see also id.* at 133-46 (describing "Bell System Attempts to Eliminate Competition").

Other communications services were also dominated by a small number of firms. *See Further Notice of Proposed Rulemaking*, 84

which regulates communications providers, was the product of Congress's concerns about monopoly control of these essential services.

In general, "Title II represents the traditional approach to public utility regulation." *See Further Notice of Proposed Rulemaking,* 84 F.C.C.2d 445, 457 (1981).[5] When customers can turn only to a single entity for service, market forces do not operate to preclude that entity from charging unreasonably high or discriminatory rates, or from engaging in predatory pricing to deter prospective competitors. Government must therefore regulate prices to protect consumers. *See Second Report and Order,* 91 F.C.C.2d 59, 60 (1982) ("Title II regulatory scheme was intended to constrain the exercise of substantial market power").

Section 203 of the Act is a typical component of traditional "public utility" regulation. Tariffs provide regulators with ready access to price information, and thereby facilitate affirmative government supervision of the rates charged consumers. Section 203 thus functions in an ancillary capacity; it supports the Commission's ability to enforce the substantive mandates of Title II under monopoly conditions, but is not itself intrinsically beneficial.

So long as monopoly conditions prevailed throughout the market, Section 203's ancillary tariff requirements were fully consistent with the Communications Act's core objectives of ensuring economical and efficient telephone service. 47 U.S.C. § 151. Though tariffing imposed substantial administrative costs on both the regulated common carriers and the Commission, the Commission

F.C.C.2d at 459-60 (setting forth evidence of industry concentration considered by the 1934 Congress).

[5] *See also* 84 F.C.C.2d at 448-49. *See generally* Kahn, *The Economics of Regulation,* Vol. I, Ch. 1 (1971).

judged that those costs were more than offset by the protection from unreasonable or discriminatory pricing afforded consumers. *See Further Notice of Proposed Rulemaking,* 84 F.C.C.2d at 478 ("In a regulated environment imposed to constrain market power, such requirements had evolved to protect the consumer from supranormal or discriminatory pricing."). During the "relative constancy [in] the telecommunications industry between 1934 and the 1970's," therefore, the Commission had no reason to exercise its power under Section 203(b)(2) to modify Section 203's tariff filing requirement.[6]

2. Development and Impact of the Permissive Detariffing Rule For Nondominant Carriers.

In the 1970s, advances in technology reduced the investment required to enter the market, and FCC decisions authorized competition in certain services. As a result, competitors emerged to challenge the Bell System for the first time. The Commission noted in 1981 that:

> [t]he present communications marketplace is quite different than the one in 1934. New technologies and public needs have in recent years spawned a variety of communications services, often provided by new entrants into the communications marketplace. A number of these firms offer innovative or specially designed services and facilities to a relatively small number of business customers. Many own few or no facilities of their own, but utilize the basic transmission services of other carriers. Almost all are subject to vigorous competition among themselves or with established carriers. An even greater number of entrants and new services seem certain to emerge in years to come. Thus, the future communications marketplace also promises to be quite different in many ways from that in 1934.[7]

[6] *Further Notice of Proposed Rulemaking,* 84 F.C.C.2d at 446.

[7] 84 F.C.C.2d at 446.

The Commission understood that these profound changes called for a reassessment of traditional regulatory policies. Consistent with its mandate to further the public interest in reliable and efficient communications service, the Commision sought "to reconcile the use of traditional regulatory tools . . . with the characteristics of the firms operating in the communications arena." *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 455. The Commission believed that market incentives would discipline firms lacking market power, and thus made mandatory tariffs unnecessary to prevent unreasonable or discriminatory pricing by such firms. The Commission further concluded that imposing a tariff requirement on market-disciplined firms would dampen competition. The Commission was concerned that administrative requirements alone would impose substantial costs on potential or recent market entrants. Furthermore, advance publication of prices and other terms and conditions might artificially stabilize prices at supracompetitive levels. *Id.* at 478. *See generally United States v. Container Corp. of America*, 393 U.S. 333 (1969). More generally, the Commission found, tariff requirements would impede the ability of competitive firms to "price and diversify their services" in response to rapid market fluctuations, 84 F.C.C.2d at 455, and thus threatened to undermine the dynamism of the emerging competitive long distance market. *Id.* at 456.

The FCC found, therefore, that in a competitive market a universal tariff requirement no longer advanced the overall goals of the Communications Act. *See Second Report and Order*, 91 F.C.C.2d at 65 ("traditional tariff regulation of non-dominant carriers is at odds with the purposes of the Act because it inhibits price competition, service innovation and the ability of firms to respond quickly to market trends"). Because tariffs have no intrinsic value apart from their role in facilitating regulation of monopoly pricing practices, there was simply no reason

to continue to impose the substantial costs tariffs entail. *See Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 483 ("the provision for filing tariffs was included as a means of insuring that carriers not discriminate; it was not an end in itself").

As the Commission noted in 1980, so long as regulation imposes costs on firms, not justified by the benefits thereof, the services provided by those firms "can never be as 'efficient' nor can the charges be as 'reasonable' as they might be in the absence of such artificial costs." *First Report and Order*, 85 F.C.C.2d 1, 13 (1980). To the extent the Act permitted the Commission to modify tariff requirements, therefore, modification would plainly be "consistent with, and perhaps mandated by, the express objectives of the Act to assure widely available, efficiently produced, and reasonably priced communications service." *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 448.

The FCC commenced a rulemaking in 1979, called the *Competitive Carrier* proceeding, to consider how regulation should evolve in this new environment. In its *First Report and Order*, the Commission took a first step in the direction of deregulation. It determined that the tariffing requirements of Section 203 should apply more stringently to dominant carriers with market power than to nondominant carriers.[8]

In a *Further Notice of Proposed Rulemaking* in 1981, the FCC concluded that for nondominant carriers, the tariff filing requirement "has worked the perverse effect of imposing a measure which (1) is superfluous as a con-

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[8] In particular, the FCC concluded that market power allowed dominant carriers to set unreasonable or discriminatory prices contrary to the dictates of Sections 201 and 202 of the Communications Act, while nondominant carriers were constrained by the market and thus could not set such illegal prices. 85 F.C.C.2d at 20-21.

sumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation." 84 F.C.C.2d at 478-79. Concluding that "the effects of applying the tariff requirements of Section 203 to non-dominant carriers frustrate the underlying purposes of the Act," the Commission proposed that these requirements be gradually modified to apply only when carriers had market power. *Id.* at 478.[9]

To implement this policy, the Commission followed a "step-by-step approach through which [it] gained experience with selectively lessening regulatory burdens." [10] The Commission initially made tariffing optional for certain limited classes of nondominant carriers,[11] "for which [the FCC was] confident that tariff filings were not necessary to promote [the Commission's] statutory goals." [12]

In its *Fourth Report and Order*, 95 F.C.C.2d 554 (1983), the Commission extended permissive detariffing

[9] *See also Second Report and Order*, 91 F.C.C.2d 59, 60-61 (1982) (tariffs for nondominant carriers are "counterproductive to the advancement of the Act's express objectives as set forth in Section 1").

The FCC expressly "under[took] a careful examination of the nature of its authority under Title II of the Communications Act of 1934," 84 F.C.C.2d at 446, and concluded that it could remove tariff obligations on firms that lack market power, pursuant to the FCC's power under Section 203(b) to "modify any requirement . . . of this section." *Id.* at 479-80.

[10] *Fifth Report and Order*, 49 Fed. Reg. 34,824, 34,824 (Sept. 4, 1984).

[11] The FCC first extended the permissive detariffing rules to resellers of domestic services, *see Second Report and Order*, 91 F.C.C. 2d 59 (1982), and shortly thereafter to resellers operating on domestic off-shore points, *see Third Report and Order*, 48 Fed. Reg. 46,791 (Oct. 14, 1983).

[12] *Fifth Report and Order*, 49 Fed. Reg. at 34,824.

to a broader group of nondominant carriers, including MCI. Based upon its experience of reviewing tariffs from such carriers, the Commission found "no evidence that it is in the public interest for us to continue receiving . . . [these tariff] filings," and no evidence that tariffs were required to prevent nondominant carriers "from charging unjust or unreasonable rates or making service unavailable." *Id.* at 578 & n.79. The FCC further noted that "[i]t is costly for carriers to prepare tariff . . . filings under our rules for dominant carriers . . . [and] these filings can impede entry, impair competitive pricing, and facilitate collusive conduct." *Id.* at 555 n.1. The Commission concluded: "[W]e believe that the purposes of the Communications Act are best satisfied by reduced entry, exit, and pricing barriers and burdens for nondominant carriers." *Id.* at 579-80. No party petitioned for judicial review of this permissive detariffing rule.[13]

As the FCC anticipated, this regulatory shift helped usher in robust competition in the long distance market. As the Commission found in the *November 25th Report and Order*:

[13] In 1985, the Commission attempted to go still further, specifically to *forbid* nondominant carriers from filing tariffs. *See Sixth Report and Order*, 99 F.C.C.2d 1020 (1985). MCI opposed this mandatory detariffing as inconsistent with the flexibility the FCC's permissive detariffing rules were intended to promote. The D.C. Circuit invalidated mandatory detariffing on the ground that it exceeded the scope of the FCC's modification power under Section 203(b). *See MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985). That court distinguished mandatory detariffing from permissive detariffing, holding that the FCC "fundamentally altered" the tariff policies when it implemented mandatory detariffing. *Id.* at 1190. The court expressly did *not* consider whether the permissive detariffing rule was within the FCC's authority to enact, *id.* at 1190 n.4, and thus the permissive detariffing rule continued unchallenged until 1989, when AT&T filed a complaint against MCI, which also set in motion the proceeding that ultimately led to this appeal.

> The decade of actual experience under permissive detariffing provides further confirmation of the success of that approach in furthering the statutory goals of the Comunications Act. In 1982, approximately a dozen long distance carriers operated within the United States. By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers. Given this evidence, we believe it is clear that our permissive detariffing rules have allowed for new entrants into the interexchange market and have given consumers more flexibility with respect to the price of service, type of services, and selection of carriers.

Pet. App. 30a.

These regulatory changes did not, however, undermine Title II's requirements that rates be reasonable and nondiscriminatory. All carriers remained subject to those statutory commands, and the Commission continued to enforce them—both on its own initiative and in response to complaints from the public. Indeed, after the *Fourth Report and Order*, the large majority of long distance telephone service continued to be provided under tariff. All of AT&T's services, which constitutes approximately two-thirds of the market, were tariffed, as were most of MCI's. MCI provided untariffed service for only a limited number of major corporate customers with which MCI had negotiated individual contracts.

3. AT&T's Challenge to the Permissive Detariffing Policy.

a. AT&T's Original Support For Permissive Detariffing.

AT&T originally defended permissive detariffing before the Commission and in court. *See Sixth Report and Order*, 99 F.C.C.2d at 1027; *MCI Telecommunications Corp. v. FCC*, 799 F.2d 773 (Table) (D.C. Cir. 1986) (No 84-1402) (Br. for Intervenor AT&T Information Systems, Inc. at 40-41). AT&T also testified before Congress that the FCC possessed "ample authority" under Section 203 to lift tariff obligations for all carriers, and that "[r]egulatory burdens . . . , designed for a predivesture world, prevent AT&T from offering customers the lower prices and creative services that its people and its technology could bring."[14] At no time did AT&T petition for review of the FCC's rulemaking orders establishing the permissive detariffing policy.

b. AT&T's Complaint Proceeding.

Despite its prior positions in administrative, judicial and legislative fora, on August 7, 1989, AT&T filed a complaint with the FCC alleging that MCI had violated Section 203 by providing untariffed services to certain large business customers pursuant to the permissive detariffing rules. AT&T sought damages and prospective relief against MCI, but made clear that its principal objection was not to permissive detariffing *per se* but to the FCC's refusal to extend it to AT&T.[15] MCI defended on the ground that it had adhered to the unchallenged permissive detariffing rules set forth in the *Fourth Report and Order*.

On January 28, 1992, the Commission denied AT&T's damages claim,[16] and dismissed AT&T's claims for pro-

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[14] *Long-Distance Competition: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 99th Cong., 1st Sess. 126 (Sept. 5 & 11, 1985).

[15] *See* Letter from Francine Berry, AT&T, to Donna Searcy, Secretary, Federal Communications Commission (Aug. 7, 1989) ("The Commission's regulatory reforms have not kept pace with the fierce growth of [long distance] competition. Rather than a temporary, transitional measure, the *Competitive Carrier* structure has become a seemingly-permanent imbalance that imposes onerous regulatory requirements uniquely and unfairly on one participant in an intensely competitive market.").

[16] The Commission held that it would be "manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability." *In re AT&T* v. *MCI*, 7 FCC Rcd. 807, 809 (1992).

spective relief. The Commission found MCI's conduct to be within the permissive detariffing rules. Thus, AT&T's claim was "in practical effect a challenge to the Commission's previously adopted and effective" rule. The Commission determined that the issue should be addressed in a rulemaking proceeding, because (1) "this rule represents one of the cornerstones of our regulation of the long-distance industry" and (2) "[a]ny change in this fundamental policy would have a significant impact on a broad range of customers and providers of telecommunications services across the nation." [17]

c. *The Rulemaking Proceeding.*

On the same day it dismissed AT&T's complaint, the Commission instituted a rulemaking to re-examine permissive detariffing in light of AT&T's challenge. *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd. 804 (1992). More than 40 parties, including AT&T, submitted comments in response to the Commission's notice.[18] On November 5, 1992, the Commission reaffirmed

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[17] 7 FCC Rcd. at 809.

[18] Comments filed by users of telecommunications services in *Tariff Filing Requirements for Interstate Common Carriers*, CC Docket No. 92-13 (comments filed Mar. 30, 1992), demonstrated the value of permissive detariffing to customers. *See, e.g.*, Comments of First Financial Management Corporation, at 2 ("FFMC spends approximately $30 million per year on these services. Because of the unique nature and high volume of FFMC's telecommunications needs, no tariff or combination of tariffs currently on file at the Commission meets FFMC's needs in a cost effective manner. Only a contractual arrangement offers FFMC the customized package of services and flexibility it needs to compete effectively in the information services industry and to continue to offer new and innovative services to its customers on a timely basis."); Comments of International Business Machines Corporation, at 13 ("Interexchange service providers increasingly offer highly customized service options designed to meet the needs of individual users."); Comments of Ad Hoc Telecommunications

the validity of the permissive detariffing rules. On November 25, 1992, the Commission released the text of its formal Report and Order reflecting that action.

In this *November 25th Report and Order*—the rulemaking order at issue here—the Commission recognized that Section 203(a) states that "every carrier" shall file tariffs for common carrier services, but noted that Section 203(b) specifically permits the Commission to "modify any requirement made by . . . this section . . . by general order applicable to special circumstances or conditions." The Commission noted that, with a single exception (for the notice period for modifications), "Congress did not . . . intend to limit . . . [that] power" to modify the requirements of Section 203. *November 25th Report and Order*, Pet. App. 13a-14a.

The Commission also concluded that Congress was fully aware of the permissive detariffing policy for nondominant carriers, and had repeatedly acquiesced in it. The Commission explained that Congress's "recent enactment of the [Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA")] . . . demonstrated its awareness" of permissive detariffing, and that Congress "made no attempt to disturb it." Pet. App. 23a (citing S. Rep. No. 439, 101st Cong., 2d Sess. 3 & n.10 (Aug. 30, 1990)). The Commission noted that in TOCSIA, Congress had expressly imposed tariff requirements for a subset of services provided by nondominant carriers—an action that would have been gratuitous had Congress understood Section 203 as imposing an unwavering tariff requirement. *Id.* at 23a-24a. The Commission also noted that Congress amended Section 203 itself without disturb-

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Users Committee, at 3 (permissive detariffing "has enabled nondominant carriers to respond flexibly to requests for proposals (RFPs), to cost out their responses on a project-specific basis, and to formulate customer-responsive terms and conditions").

ing permissive detariffing for nondominant carriers. *Id.* at 24a.

The Commission also reviewed the rationale for making tariff obligations conditional on possessing market power, and concluded that reversal of this policy would thwart the purposes of the Communications Act because the policy "played a major role in the rapid development of competition and in the consumer benefits that have resulted." Pet. App. 29a. The Commission determined that "but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered the competitive fray at all." *Id.* The Commission also reaffirmed that it continued to possess ample ability to enforce the reasonableness and antidiscrimination provisions of the Communications Act against *all* carriers. *Id.* at 28a.

d. *The D.C. Circuit's Invalidation of Permissive Detariffing.*

While the rulemaking was pending, AT&T petitioned the D.C. Circuit for review of the Commission's decision to dismiss AT&T's administrative complaint against MCI. Both the Commission and MCI argued that the appeals court should not decide the validity of the Commission's permissive detariffing rule, which was under consideration in the separate rulemaking proceeding. After oral argument, but before the panel's decision had issued, the court was informed that the Commission had reaffirmed permissive detariffing and that a formal rulemaking order setting forth the Commission's views would issue shortly. Without waiting for the FCC's rulemaking order, the court issued an opinion on November 13, 1992, invalidating permissive detariffing, and indicating that carriers such as MCI might be liable in damages to AT&T despite compliance with the FCC's policy.

The panel held that the FCC should have decided the legality of the permissive detariffing rule in AT&T's complaint proceeding, rather than deferring consideration to a rulemaking. *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); Pet. App. 37a. Instead of remanding, however, the appeals court resolved the statutory interpretation question itself. The panel held that the court's earlier decision invalidating the Commission's mandatory detariffing rule, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985); *see* note 13 *supra*, "foreclose[d] the Commission's argument in this case." According to the court, *MCI v. FCC* established that the statutory term "modify" in Section 203(b) authorizes changes only in "incidental or subordinate features." *Id.* (quoting Black's Law Dictionary 905 (5th ed. 1979)). Based on this narrow reading of "modify," the panel concluded that permissive detariffing "exceeds the limited authority granted the Commission in section 203(b)." The court reached this result despite conceding that arguments favoring the legality of permissive detariffing were "not insubstantial when made initially" in 1985, and despite the prior panel's recognition that the permissive detariffing policy had been "fundamentally altered" by the mandatory rule struck down in 1985.[19] Because the panel issued its opinion before the Commission's *November 25th Report and Order* had been released, the views expressed in that rulemaking order did not inform the panel's judgment.

Shortly after the ruling in *AT&T v. MCI*, AT&T sought summary reversal of the *November 25th Report and Order*. On June 4, 1993, the D.C. Circuit complied, on the ground that the prior panel decision in *AT&T v.*

[19] MCI petitioned this Court for review of the D.C. Circuit's 1992 ruling (No. 92-1684). The United States agreed that MCI's petition raised important questions, but suggested that those questions would be better addressed in a case reviewing the *November 25th Report and Order*. *See* Brief for the Federal Respondents in Opposition in No. 92-1684, at 12. MCI's petition in No. 92-1684 was denied.

MCI "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of of the Communications Act." *American Tel. & Tel. Co. v. FCC*, No. 92-1628, slip op. (D.C. Cir. June 4, 1993); Pet. App. 1a, 2a.

MCI petitioned for certiorari from the D.C. Circuit's ruling, as did the United States. On November 29, 1993, this Court granted both petitions.

e. AT&T's Most Recent Statement on Tariff Regulation.

While the petition for certiorari was pending, AT&T asked the FCC to classify it as a nondominant carrier, in effect requesting the benefit of all FCC tariff modifications enjoyed by nondominant carriers.[20] In that petition, AT&T expressed complete agreement with the policy rationales of the *Competitive Carrier* proceeding:

> As the Commission recognized at the outset of this docket, and reaffirmed only months ago, carriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably. The pricing of their services is effectively constrained by market forces: if such carriers sought to charge supracompetitive rates, or discriminate unreasonably, customers would simply move to other carriers; and carriers that attempt to charge prices below cost would generate losses that could never be recouped . . . .
>
> [S]uch regulation "imposes barriers and burdens [that] impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs," as the Commission has found. . . . Thus, direct economic regulation is not merely unnecessary; it impedes the "dynamism" of a competitive market and "impose[s] both direct and indirect costs on users." [21]

[20] *See* Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, filed Sept. 22, 1993, in *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket 79-252. A copy of this document has been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

It is common ground that the FCC's permissive detariffing policy for nondominant carriers advanced the core public interest objectives of the Communications Act, 47 U.S.C. § 151, because it brought about more economical and efficient long distance service. The only question presented here is whether this policy is within the Commission's statutory authority.

The D.C. Circuit concluded that the particular statutory commands of Section 203 foreclosed permissive detariffing, and thus shackled the Commission to an obsolete tariff regime that harmed the public interest. Under the controlling principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that decision was wrong.

The FCC's permissive detariffing rule for nondominant carriers is a permissible and reasonable construction of the statutory text. Section 203(b)(2) authorizes the Commission to "modify any requirement" of Section 203. On its face, that statutory phrase authorizes the Commission to modify Section 203's requirement that carriers file tariffs. The ordinary meaning of the word "modify" comfortably encompasses permissive detariffing, and does not limit the Commission to minor or subordinate changes. A nondominant carrier's lack of market power is certainly a "special circumstance or condition" justifying modification. Section 203(c), which sets forth Title II's "filed rate" requirements, plainly contemplates that the Commission may exempt carriers from Section 203's filed rate requirements. Thus, the Commission's interpretation is fully consistent with the particular phrase "modify any

[21] *Id.* at 16-17 (quoting 6 FCC Rcd. at 5895).

requirement," the text of Section 203 read as a whole, and the overall objectives of the Act.

There is simply no basis upon which a court may reject that interpretation. It is implausible to argue that the "plain meaning" of Section 203 forecloses the Commission's interpretation of its modification power. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). To the contrary, deference is especially warranted because Section 203(b) expressly delegates authority to the FCC to decide when modification is appropriate. *See United States v. Morton*, 467 U.S. 822, 834 (1984). The tariff issues involved here are highly technical and at the core of the agency's expertise. *See Chevron*, 467 U.S. at 844; *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984). This delegation is consistent with the overall scheme of the Communications Act, which has long been recognized as a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). And permissive detariffing directly furthers the goals of economical and efficient telephone service at the core of the Commission's statutory mandate. (Point I).

Congressional ratification dispels any doubt as to the legitimacy of permissive detariffing for nondominant carriers. Congress repeatedly revisited and amended Sections 202-204 of Title II during the 1980s—and specifically amended Section 203—with full awareness of the Commission's permissive detariffing rule. Furthermore, TOCSIA, enacted in 1990, would be rendered nonsensical were the appeals court's interpretation of Section 203 to prevail. (Point II).

Nor is permissive detariffing for nondominant carriers invalid by reason of any supposed inconsistency with a general "filed rate doctrine." No such doctrine exists

apart from the commands of particular statutory schemes, as interpreted and implemented by different expert agencies. Because the Communications Act does not impose an unyielding demand for tariffs irrespective of the wisdom of such a policy, and expressly authorizes the Commission to modify the tariff filing requirement, the *November 25th Report and Order* must be upheld as a permissible exercise of the Commission's authority. (Point III).

ARGUMENT

I. BECAUSE THE COMMISSION'S PERMISSIVE DETARIFFING POLICY FOR NONDOMINANT CARRIERS REPRESENTS A REASONABLE EXERCISE OF THE AUTHORITY DELEGATED BY SECTION 203, THAT POLICY IS ENTITLED TO DEFERENCE.

The Commission promulgated its permissive detariffing rule in an exercise of authority expressly delegated by Congress in Section 203. *See November 25th Report and Order*, Pet. App. 13a-14a. Section 203(b)(2) empowers the Commission to "modify any requirement made by . . . this section either in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b). On its face, this language authorizes modification of "any" statutory requirement of Section 203(a), including the "requirement" that carriers file tariffs for all services. The issue, therefore, is whether the Commission's permissive detariffing rule was a proper exercise of its delegated authority to "modify" that requirement.

Chevron controls here. It establishes a "dominant, well-settled principle of federal law" requiring "judicial deference to reasonable interpretations by an agency of a statute that it administers." *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-1402 (1992); *Sullivan v. Everhart*, 494 U.S. 83, 92-93 (1990). Under *Chevron*, if "Congress has directly spoken to the precise question at issue . . . the court, as well as

the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. If Congress has not expressly foreclosed the agency action at issue, courts must defer to the agency's interpretation if its construction of the statute is reasonable. *Id.*

A. The Text of Section 203 Does Not Foreclose the Commission's Interpretation of its Modification Authority.

Reviewing courts may forego *Chevron* deference only if the statutory term at issue "cannot bear the interpretation adopted by the [agency]." *Sullivan v. Everhart,* 494 U.S. at 92; *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 644 (1990). "If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 292 & n.4 (1988); *see also Good Samaritan Hosp. v. Shalala,* 113 S. Ct. 2151, 2162 (1993); *Bowen v. Yuckert,* 482 U.S. 137, 145 (1987); *Cottage Sav. Ass'n v. Commissioner,* 111 S. Ct. 1503, 1508 (1991). Where, as here, Congress has not merely left an issue open, but has expressly delegated discretion to the agency, deference is at its zenith. *Pauley v. BethEnergy Mines, Inc.,* 111 S. Ct. 2524, 2534 (1991).

It cannot be argued that the "plain meaning" of Section 203 forecloses permissive detariffing. To the contrary, the Commission's interpretation of the scope of its modification authority is entirely consistent with the text of Section 203. The power to modify granted in Section 203 extends to "*any* requirement" established by that section. The requirement that tariffs be filed is not exempted. Nor is the modification power restricted to minor or incidental requirements. "Had Congress intended the narrow construction . . . it could have so indicated." *Smith v. United States,* 113 S. Ct. 2050, 2054 (1993) (declining to read the text "use a firearm" to mean only

"use a firearm as a weapon"); *see also Norfolk & Western Ky. Co. v. American Train Dispatchers Ass'n,* 499 U.S. 117, 129 (1991) (phrase "all other law . . . indicates no limitation"). Congress has not done so, and additional restrictions should not be imposed by this Court. Under the statute's plain meaning, therefore, the Commission's power to modify "any requirement" must encompass the power to modify the requirement that "every . . . carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges." 47 U.S.C. § 203(a).

Thus, this case comes down to whether the permissive detariffing policy is a modification within the meaning of Section 203(b)(2). Because "modify" is not defined in the Communications Act, it should be "construe[d] . . . in accord with its ordinary or natural meaning." *Smith,* 113 S. Ct. at 2054. Webster's Dictionary defines "modify" alternatively to mean "to make minor changes in" *or* "to make basic or fundamental changes in, often to give a new orientation to or serve a new end." *See* Webster's Ninth New Collegiate Dictionary 763 (1988). Congress thus delegated authority to make changes in the tariff requirements—both "minor" and "fundamental."[22] The latter definition comfortably encompasses the Commission's permissive detariffing rule. The FCC has simply changed a previously unqualified requirement by making it conditional on the existence of specified characteristics—*i.e.,* possessing market power. It is as much a "modification" to change the conditions under which a requirement applies as to change the specific duties imposed when it does apply.

This Court repeatedly has held that "[t]he existence of alternative dictionary definitions . . . each making some

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[22] Indeed, this Court has recognized under the Clean Water Act that the term "modify," the precise statutory term at issue here, "has no plain meaning . . . and is the proper subject of construction" by the agency. *Chemical Mfrs. Ass'n,* 470 U.S. at 126.

sense under the statute, itself indicates that" deference is required so long as the agency's position is consistent with one of the definitions. *Boston & Maine Corp.*, 112 S. Ct. at 1402; *accord Sullivan v. Everhart*, 494 U.S. at 91-92.[23] This is true irrespective of whether the interpretation is "the best or most natural one by grammatical or other standards," *BethEnergy*, 111 S. Ct. at 2537, so long as it is "plausible." *Rust v. Sullivan*, 111 S. Ct. 1759, 1767 (1991); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 405 (1987). It is especially true where, as here, a statutory term by its very nature confers a *range* of authority. If the agency's interpretation conforms to one common meaning of the term Congress uses, the agency must be understood to be within the range of authority conferred.

The Commission's permissive detariffing policy modifies the requirements of Section 203 just as Section 203 (b)(2) contemplates, "by general order applicable to special circumstances or conditions." 47 U.S.C. § 203 (b)(2). Only when a long distance carrier lacks market power is the statutory requirement set aside. From Congress's perspective in 1934, a long distance carrier's lack of market power would plainly be a special circumstance or condition. Thus, nothing in the text of Section 203 (b)(2) evinces a congressional intent to preclude permissive detariffing.

[23] The instant case is much like *Boston & Maine Corp.* At issue in that case was the meaning of the word "required" in a statute authorizing condemnation of property "required" for Amtrak's operations. The agency interpreted "required" to give it flexible power to exercise condemnation authority. The D.C. Circuit held that the statutory term was unambiguous, and conferred only a narrow condemnation authority in instances where the desired property was "indispensable" to Amtrak's operation. 911 F.2d 743 (D.C. Cir. 1990). This Court applied *Chevron* and reversed. The Court acknowledged that "required" would bear the narrow meaning ascribed by the court of appeals, but found ambiguity because standard dictionary sources contained far broader definitions. This ambiguity was, as the Court made clear, sufficient to require *Chevron* deference.

The Commission's interpretation is fully consistent with the text of Section 203 taken as a whole. If the modification power of Section 203(b)(2) did not extend to the requirements established by Section 203 itself, it would be superfluous. Sections 203(a) and (b)(1) specifically confer on the Commission the power to impose (and modify or remove) *additional* requirement beyond those of the statute itself. If Section 203(b)(2) did *not* confer the power to modify the basic requirements of the statute itself, the provision would serve no purpose beyond that already served by Sections 203(a) and 203(b)(1).[24]

Section 203(c) eliminates any doubt that Congress authorized the Commission to permit untariffed service. That provision expressly states that:

> No carrier, *unless otherwise provided by or under authority of this chapter*, shall engage or participate in such communication unless schedules have been filed and published . . . .

47 U.S.C. § 203(c) (emphasis added). This language makes clear that Congress contemplated that the Commission could excuse carriers from statutory tariff obligations.

The specific "filed rate" requirements set forth in Section 203(c) provide no support for the court of appeals' view that tariffs are mandated whether needed or not. Each of those requirements applies only when the schedules described in the first sentence of Section 203(c)

[24] The last clause of Section 203(b)(2) places a single categorical restriction on the Commission's power to modify "any requirement." The Commission "may not require the notice period specified in paragraph (1) to be more than one hundred twenty days." The statutory construction principle *expressio unius est exclusio alterius* indicates that by limiting the Commission's power in one specific way, Congress intended no other limits. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978); *see also Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2545 (1991) (Scalia, J., dissenting) ("When a provision sets forth a general rule followed by specific exceptions to that rule, one must assume—absent other evidence—that no further exceptions are intended.").

must be filed. Section 203(c)(1) applies to "any such schedule"; Section 203(c)(2) applies to "charges so specified"; Section 203(c)(3) applies to "such schedule." *None* applies, therefore, when the Commission has provided pursuant to Section 203(b)(2) that no schedule need be filed or published.

The Commission's interpretation is also consistent with the overall objectives of the Act, because, as discussed above, permissive detariffing indisputably results in cheaper and more efficient telephone service. That interpretation of Congress's specific grant of authority to modify the requirements of Section 203 should be given the substantial deference generally afforded the Commission's regulatory efforts to advance the public interest objectives of the Communications Act. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

B. Permissive Detariffing is a Permissible Interpretation of Section 203.

Because permissive detariffing for nondominant carriers is a modification within the meaning of Section 203(b)(2), the only question remaining is whether it was a reasonable one. It plainly was, as even the D.C. Circuit conceded.[25] As in *Chevron*, the "interpretation represents a reasonable accommodation of manifestly conflicting interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." 467 U.S. at 865.

[25] Indeed, the D.C. Circuit did "not quarrel" with the FCC's policy objectives. *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 736 (D.C. Cir. 1992); Pet. App. 57a.

The Commission has studied precisely that question for more than a decade, and the *November 25th Report and Order* plainly reaches a well-reasoned conclusion that permissive detariffing for nondominant carriers affirmatively furthers the substantive policies of Title II. In particular, the Commission has carefully considered whether permissive detariffing of nondominant carriers would undermine enforcement of Title II's substantive prohibitions of unreasonable and discriminatory rates.[26] Based on that analysis, the Commission has concluded that, for carriers without market power, the risk of unreasonable or discriminatory pricing is negligible because market forces will discipline carrier efforts to take advantage of consumers in this way. This reliance on market forces enabled the Commission to resolve a conflict between the overall objectives of the Act, 47 U.S.C. § 151, and the specific regulatory mechanisms of Section 203—a conflict resulting from evolution in the long distance market. *See* pages 6-7, *supra*. *See generally FCC v. WNCN Listeners Guild*, 450 U.S. at 590-93.

AT&T itself *concedes* the correctness of this conclusion, noting that "carriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably" because "if such carriers sought to charge supracompetitive rates, or discriminate unreasonably, customers would simply move to other carriers." *AT&T Motion for Reclassification, supra* note 20.

The Commission's predictions on the value of permissive detariffing have been validated by experience. The Commission has concluded that "[a]ctual experience during a decade of permissive detariffing helps confirm that the Commission's permissive detariffing policy has played a substantial role in the development of competition in the interexchange market and the increased choices for cus-

[26] *See Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 456-63, 471-84; *Second Report and Order*, 91 F.C.C.2d at 65-73; *Fourth Report and Order*, 95 F.C.C.2d at 555-62, 577-82.

tomers with respect to carriers and prices." *Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd. 1395, 1396 (1993); *see also November 25th Report and Order*, Pet. App. 26a-30a. Nothing in the administrative record casts any doubt on this conclusion, and AT&T has not challenged it.

The Commission's judgment that the substantive mandates of Title II can be adequately enforced under the permissive detariffing regime is precisely the kind of expert judgment that should not be second-guessed by reviewing courts. Because determination of the most effective means of enforcing the Act's substantive standards "necessarily require[s] significant expertise, and entail[s] the exercise of judgment grounded in policy concerns . . . , courts appropriately defer to the agency entrusted by Congress to make such policy determinations." *BethEnergy*, 111 S. Ct. at 2534.

In *BethEnergy*, as here, Congress delegated authority to an agency under its governing statute. And in *BethEnergy*, as here, the underlying statutory scheme, and the resulting regulatory regime, were "complex and highly technical." 111 S. Ct. at 2534. "It is precisely [that] recognition that inform[ed] [this Court's] determination that deference . . . is appropriate." *Id.* This exercise of delegated power under a highly technical statutory and regulatory scheme must be upheld absent compelling indications that it is wrong. *See Chevron*, 467 U.S. at 864-66; *Chemical Mfrs.*, 470 U.S. at 134; *Litton Fin. Printing Div. v. NLRB*, 111 S. Ct. 2215 (1991); *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 980-82 (1986).

Thus, because the Commission carefully considered precisely the right question and articulated a well-reasoned response to that question, the permissive detariffing policy of the *November 25th Report and Order* must be upheld.

II. CONGRESS HAS RATIFIED THE COMMISSION'S PERMISSIVE DETARIFFING RULE.

Congressional ratification of permissive detariffing further confirms that the Commission has properly exercised its statutory authority.

Congress has long been on notice of the Commission's permissive detariffing policy. During the 1980s, the policy was repeatedly explained in committee testimony and written submissions by the FCC Chairman and Commissioners.[27] When Congress amended Title II in 1990, the

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[27] *See, e.g.*, Letter from Mark Fowler, Chairman, FCC to Sen. Donald Riegle:

> Throughout our Competitive Carrier proceeding, begun in 1980, this Commission, in order to promote competition and lower costs, has taken repeated steps to identify and eliminate unnecessary regulation of certain classes of carriers in the various telecommunications markets. As a result, various unnecessary and costly regulatory burdens have gradually been lifted from non-dominant carriers, including MCI, GTE Sprint, and other similar long distance service providers. Because non-dominant carriers lack market power we have found the filing of rate schedules generally unnecessary and unreasonably burdensome.

131 Cong. Rec. 1533-34 (daily ed. Jan. 31, 1985); *see also Universal Telephone Service Preservation Act of 1988: Joint Hearings on S. 1660 and H. 3621 Before the Senate Comm. on Commerce, Science and Transportation and the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 115 (1983) (Statement of Commissioner Fowler) (explaining the FCC's authority to deregulate non-dominant carriers); *Long Distance Competition: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 105 (1985) (Statement of Commissioner James H. Quello) [hereinafter *Long Distance Competition Hearings*] (detailing permissive detariffing); *Federal Telecommunications Policy Act of 1986: Hearings on S. 2565 Before the Senate Committee on Commerce, Science and Transportation*, 99th Cong., 2d Sess. 89 (1986) (Statement of Commissioner Fowler) (same); Letter from Dennis Patrick, Chairman, FCC, to Rep. John Dingell, Chairman, House Committee on Energy and Commerce, and Rep. Edward Markey, Chairman of Subcommittee on Telecommunications (Dec. 7, 1987) (part of the FCC rulemaking record) (same).

legislative history reflected clear congressional awareness that "[t]he FCC has chosen to 'forbear' from regulating the rates of 'non-dominant' carriers because they do not possess market power and thus have little ability to charge unjust or unreasonable rates in violation of the Communications Act." *See* S. Rep. No. 439, 101st Cong., 2d Sess. 3 n.10 (1990).[28]

AT&T itself repeatedly raised the policy in congressional testimony throughout the 1980s. Though challenging the FCC's refusal to extend permissive detariffing to dominant carriers, AT&T made clear its position that "[t]he FCC has ample authority from the Congress to take the needed action," and urged Commission action to "eliminate the onerous tariff regulations . . . designed for a monopoly age which has passed," and thereby to obviate any need for remedial legislation.[29]

Because Congress has plainly been aware of permissive detariffing for a decade, mere congressional silence would suffice to validate it. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).[30] But here

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[28] This report accompanied enactment of S. 1660, the Telephone Operator Consumer Services Act of 1990 ("TOCSIA"), discussed *infra*. The House Report evinced the similar understanding of the House of Representatives. *See* H.R. Rep. No. 213, 101st Cong., 1st Sess. 3 (1989) ("Since the FCC classifies these . . . providers as 'nondominant' or carriers with market power [sic], the Commission currently does not regulate their rates."); *id.* at 6 ("[T]he FCC has refused to regulate AOS rates because doing so would violate the Commission's long-standing policy of regulating only those companies with market power.").

[29] *Long Distance Competition Hearings*, at 124 (Statement of AT&T Chairman Charles Brown); *id.* at 123, 126, 134. *See also FCC Telephone Price Cap Proposal: Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, at 604-05 (1988).

[30] Moreover, Congress acted as an active "watchdog" over the FCC. *See generally* 137 Cong. Rec. S6378 (daily ed. May 22, 1991) (Statement of Sen. Daniel Inouye, Chairman of the Subcommittee on Telecommunications) ("[T]he FCC is constantly

there is much more. Congress specifically amended Section 203 itself in 1989 and 1990,[31] and made other significant changes in Title II in 1988, 1990, and 1993,[32] and never disturbed the FCC's interpretation. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974)); *accord Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986); *see United States v. Rutherford*, 442 U.S. 544, 554 (1979); *CBS, Inc. v. FCC*, 453 U.S. 367, 382 (1981).[33]

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making key policy decisions that fundamentally affect the marketplace. The importance of the FCC and its actions cannot be underestimated. That is why, since 1981, the Congress has enacted legislation to establish authorization levels for the FCC. The Congress views such legislation as a way to increase its oversight of the FCC in the current dynamic environment."). When Congress exercises stringent oversight through annual authorization and appropriations acts, the case for acquiescence is stronger. *See Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, 118-19 (1947); *Brooks v. Dewar*, 313 U.S. 354, 360-61 (1941).

[31] *See, e.g.*, Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, Title III § 3002(a), 103 Stat. 2131 (1989) (increasing penalty for violating tariff provisions); FCC Authorization Act of 1990, Pub. L. No. 101-396, § 7, 104 Stat. 850 (1990) (increasing time period for FCC to review tariffs).

[32] *See* FCC Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021 (1988) (setting deadline for investigation of tariffs); Telephone Operator Consumer Services Improvement Act of 1990, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) (to be codified at 47 U.S.C. § 332).

[33] *See also Cottage Sav. Ass'n v. Commissioner*, 111 S. Ct. 1503, 1509 (1991); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649-51 (1990); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969).

Furthermore, Congress "affirmatively manifested its acquiescence" by enacting the Telephone Operator Consumer Services Improvement Act of 1991 ("TOCSIA"), 47 U.S.C. § 226, which is premised on the existence of permissive detariffing for nondominant carriers. *See Haig v. Agee*, 453 U.S. 280, 300 (1981) (quoting *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965)).

Concerned by the practices of carriers servicing pay phones, Congress passed TOCSIA to *restore* some tariff regulations of this limited group. *See* 47 U.S.C. § 226 (h)(1)(A) (Supp. III 1991).[34] These nondominant carriers were required to file "informational tariffs" containing some, but not all, of the tariff information generally required by Section 203(a). The legislative history makes clear that Congress took this step because these carriers were " 'non-dominant' " and the FCC "took no action to regulate their rates." S. Rep. No. 439, 101st Cong., 2d Sess. 4 (1990). Congress thus acted to *increase* tariff requirements on a limited set of nondominant carriers based on particular problems associated with those carriers. Had Congress believed Section 203 required complete tariffs for *all* carriers, it surely would not have expressly legislated in a manner that assumed the validity of permissive detariffing and sought to amend it only in a single limited circumstance.[35]

TOCSIA would be rendered wholly superfluous if Section 203 imposed an unyielding mandate that carriers tariff all rates. It would simply make no sense to require a subset of those subject to Section 203 to file "informational tariffs" containing some, but not all, of the information these carriers would otherwise be required to provide by Section 203 itself. In *National R.R. Passenger Corp. v. Boston & Maine Corp.*, this Court made clear that an agency's interpretation should be accepted if it "is consistent with the . . . statutory addition enacted by Congress," and a contrary reading "would make the amendment superfluous." 112 S. Ct. 1394, 1402 (1992); *see also Young v. Community Nutrition Inst.*, 476 U.S. 974, 983-84 (1986); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 746-47 & n.17 (1984). Indeed, if the D.C. Circuit's interpretation of Section 203 were correct, TOCSIA would have perverse consequences. Were the Commission to conclude that "informational tariffs" were no longer necessary under TOCSIA, and exercised the authority in TOCSIA to waive that requirement for carriers serving pay phones, that action would effectively reimpose Section 203's *stricter* tariff requirements on those carriers.[36]

[34] *See* Pub. L. No. 101-435, 104 Stat. 986 (1990) (since FCC "actions ha[d] been insufficient to correct the problems," Congress found that "government regulation [was] required to ensure that competitive operator services are provided in a fair and reasonable manner").

[35] *See FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437-38 (1986); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983); *Bowen v. Yuckert*, 482 U.S. 137, 149-50 (1987); *Heckler v. Turner*, 470 U.S. 184, 208-09 (1985).

III. THE FILED RATE DOCTRINE UNDER THE INTERSTATE COMMERCE ACT DOES NOT CONTROL.

The "filed rate doctrine" arises from particular statutory provisions, and its scope is dictated by the specific statutory scheme governing each utility and agency.[37] For

[36] Section 226(h)(1)(B) grants the FCC the authority to waive the informational tariff filing requirements after four years if the goals of the statute are met. Under AT&T's view of Section 203, if the FCC waived the requirements on operator service providers pursuant to Section 226, those carriers would return to a tariff standard *stricter* than the one the statute allowed to be waived.

[37] In *Consolidated Edison Co. of New York, Inc. v. FERC*, 958 F.2d 429 (D.C. Cir. 1992), the D.C. Circuit upheld the Federal Energy Regulatory Commission's ("FERC") exercise of its statutory authority to modify the requisite waiting period for a rate increase by natural gas suppliers, despite argument by natural gas purchasers that FERC's action was inconsistent with the filed rate doctrine. The court noted that the filed rate doctrine was "[t]ied

this reason, *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), has little to do with the question presented here. *Maislin* does not interpret the Communications Act, does not purport to apply to any agency other than the Interstate Commerce Commission ("ICC"), and in any event, does not address the issue presented here.

Maislin did not consider the scope of the ICC's power to promulgate rules modifying tariff filing requirements under the ICA.[38] Rather, *Maislin* involved the different question whether, absent any modification of the statutory tariff requirement, the ICC could retroactively excuse a carrier that had charged a rate other than a previously tariffed rate for the service at issue. Neither of the two ICC actions under review in *Maislin* relied upon or even cited Section 10762, which empowers the ICC to modify requirements.[39] The Court in *Maislin*

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to" specific sections of the Natural Gas Act, and that "[*s*]*imilar* principles apply 'across the spectrum' of public utility regulation." *Id.* at 431 n.2, 432-33 (emphasis added) (citing *Maislin* as addressing "filed rate doctrine in Interstate Commerce Act context"). *See Reiter v. Cooper*, 113 S. Ct. 1213, 1216, 1219 (1993) ("filed rate doctrine . . . assuredly does not preclude avoidance of the tariff rate . . . through claims and defenses that are specifically accorded by the ICA itself"); *Maislin Industries U.S., Inc. v. Primary Steel Inc.*, 497 U.S. 116, 128-29 (1990); *id.* at 136 (Scalia, J., concurring) ("prior 'filed-rate' decisions . . . were based . . . on the text of the statute"); *Consolidated Edison*, 958 F.2d at 435.

[38] *Maislin* involved an attempt by a carrier's bankruptcy trustee to collect from a shipper the difference between the tariffed rate and the lower rate agreed to by the carrier prior to bankruptcy. The ICC expressly did not modify the tariff requirement, but instead focused on the equitable defenses that a shipper would have to a claim for undercharges, and the ICC's ability to determine "whether the collection of the undercharge in a particular case would constitute an unreasonable practice." *Maislin*, 497 U.S. at 121.

[39] *See NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("*Negotiated Rates I*"); *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989) ("*Negotiated Rates II*").

merely held—over a sharp dissent by Justice Stevens (joined by the Chief Justice)—that the ICC may not approve a carrier's departure from a rate it has *previously* filed for a particular service. *Maislin*, 497 U.S. at 131-33; *id.* at 137-39 (Stevens, J., dissenting).[40] Thus, the issue in *Maislin* differed fundamentally from the issue here.

In any event, the relevant portions of Section 203 of the Communications Act differ in critical respects from their ICA counterparts. As the Second Circuit has observed, Section 203 is in no sense a "carbon copy" of Section 10762. *See American Tel. & Tel. Co. v. FCC*, 503 F.2d 612, 616 (2d Cir. 1974). As the Commission explained, the ICA "analogues to Sections 203(a) and (c) are contained in separate sections of the ICA—49 U.S.C. §§ 10762(a)(1) and 10761(a), respectively." The ICA "analogue to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to 'the requirements of this section [10762].'" The ICC's power to modify tariff requirements thus "does not apply to Section 10761(a)'s command (akin to that in Section 203(c)) that motor carriers 'shall provide . . . transportation only if the rate for the transportation or service is contained in a tariff. . . .'" *November 25th Report and Order*, Pet. App. 17a. *See also Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986)

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[40] The only discussion in *Maislin* of the ICC's modification power under Section 10762(d)(1) occurred in a single footnote, and related only to the first sentence of Section 10762(d)(1) (controlling changes to notice period requirements), and not the second sentence of the section (giving the ICC more general power to modify requirements). *Maislin*, 497 U.S. at 134 n.14. In any event, the Court explicitly declined to address the actions of the ICC under § 10762(d)(1). *See id.* ("We express no view today on the validity of such policies.").

(waiver provision of § 10762(d)(1) cannot be used to nullify § 10761 requirement of a "'rate . . . contained in a tariff'"). Furthermore, the text of Section 203(c) makes quite clear that Congress contemplated exemptions from tariff requirements "under the authority" of Section 203(b), whereas no similar inference can be drawn from the text of the ICA.

Congressional treatment of filed rate requirements under the ICA and the Communications Act has also differed markedly. In *Maislin*, this Court construed the text of the ICA as evidence of Congressional intent to limit the FCC's modification authority, because the ICA exempts *contract* carriers from the requirements of Section 10761(a), thus "'demonstrating that Congress is aware of the [Section 10761(a)] requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers.'" *See November 25th Report and Order*, Pet. App. 18a. (quoting *Maislin*, 110 S. Ct. at 2771) (emphasis in original). As demonstrated, an analysis of congressional intent points in precisely the opposite direction here. Congress has repeatedly amended Section 203 of the Act with full awareness of the FCC's permissive detariffing policy, and has plainly ratified that policy. *See* Point II *supra*.

Thus, the FCC's permissive detariffing rule for nondominant carriers is not invalid by reason of some purported inconsistency with a general "filed rate doctrine."

CONCLUSION

The judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Section 203(b)(2) of the Communications Act of 1934, 47 U.S.C. 203(b)(2) (Supp. III 1991), which authorizes the Federal Communications Commission to "modify any requirement" of Section 203, permits the Commission to make Section 203(a)'s tariff-filing requirement optional for telephone companies lacking market power.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-356

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

No. 93-521

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The order of the court of appeals (93-356 Pet. App. 1a-2a) is unreported. The report and order of the Federal Communications Commission (93-356 Pet. App. 3a-36a) is reported at 7 F.C.C. Rcd. 8072. A prior

decision that the court of appeals found controlling (93-356 Pet. App. 37a-56a) is reported at 978 F.2d 727.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1993. The petition for a writ of certiorari in No. 93-356 was filed on September 2, 1993. On August 24, 1993, the Chief Justice granted the federal petitioners' request for an extension of time to file a petition for a writ of certiorari to and including October 2, 1993, and the petition in No. 93-521 was filed on October 1, 1993. On November 29, 1993, the Court granted the petitions and consolidated the cases. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 203 of the Communications Act of 1934, 47 U.S.C. 203 (1988 & Supp. III 1991), provides:

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such

schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance

with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges of facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

STATEMENT

1. Section 203(a) of the Communications Act of 1934, 47 U.S.C. 203(a), provides that telephone companies "shall * * * file" tariff schedules listing the interstate services they offer and the rates they

charge for those services. Section 203(b)(2) authorizes the Federal Communications Commission, "in its discretion and for good cause shown," to "modify any requirement" of Section 203. In the rulemaking order at issue here, the FCC modified the tariff-filing requirement of Section 203(a) by codifying previous orders permitting "non-dominant" telephone companies (those without market power) to offer interstate service without filing tariffs. Under this "permissive detariffing" policy, long distance companies other than AT&T (which has a 60% share of that market, 93-356 Pet. App. 31a) are relieved of the burdensome tariff-filing requirement. Local exchange carriers, which retain bottleneck control over local telephone service and thus over access to interstate long distance service, must continue to file interstate access tariffs.

The Commission's permissive detariffing policy was a response to the introduction of competition in the long distance market in the 1970s. When Congress passed the Communications Act in 1934, AT&T had a monopoly on the provision of long distance telephone service in the United States. See S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("[t]his vast monopoly which so immediately serves the needs of the people in their daily and social life must be effectively regulated"). That monopoly persisted until technological advances and policy decisions by the FCC permitted the entry of new competitors to the marketplace for long distance telephone services.

In a series of orders beginning in 1979 in the *Competitive Carrier* rulemaking proceeding, *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979), the FCC began to adopt rules reducing, in

increments, the requirements imposed on telephone companies lacking market power. By reducing the regulatory burden imposed on carriers with small market shares, the FCC hoped to encourage entry into the telecommunications market and vigorous competition among those who entered. The Commission believed that reducing the regulatory burden was feasible because the forces of competition would effectively preclude non-dominant carriers from charging unjust and unreasonable rates in violation of Section 201(b) of the Act, or discriminating unreasonably in violation of Section 202(a) of the Act. See 77 F.C.C.2d at 334-338.

By 1983, the Commission had relieved most non-dominant carriers, such as MCI Telecommunications Corporation and US Sprint Communications Company, of the general obligation to file tariffs. See *Fourth Report and Order*, 95 F.C.C.2d 554 (1983). Non-dominant carriers nonetheless remained (and still remain) subject to the substantive requirements of Title II that their rates be just and reasonable and not unreasonably discriminatory. The approach adopted in the FCC's *Fourth Report* was called "permissive detariffing" because non-dominant carriers were permitted, but not required, to forbear from filing tariffs. The *Fourth Report* was not challenged on judicial review.

A subsequent order in the *Competitive Carrier* proceeding made the detariffing of non-dominant carriers mandatory: Under the rules adopted in that order, such carriers no longer were *permitted* to file tariffs with the FCC. See *Sixth Report and Order*, 99 F.C.C. 2d 1020 (1985). MCI challenged the *Sixth Report* in the D.C. Circuit, contending that it had the

right under Section 203(a) to file tariffs. MCI won a ruling that the FCC lacks authority "to prohibit MCI and similarly situated common carriers from filing tariffs." *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1188 (1985). In the 1985 decision invalidating mandatory detariffing, the D.C. Circuit declined to reach the question "whether the FCC's earlier permissive orders are invalid." *Id.* at 1196.

2. In 1989, AT&T initiated an administrative complaint proceeding against MCI. AT&T's complaint to the FCC alleged that MCI was providing interstate common carrier services to some customers without having filed tariffs with the Commission, in violation of Section 203. AT&T thus challenged the FCC's permissive detariffing policy, despite having previously defended permissive detariffing before the FCC and in court. See *Sixth Report and Order*, 99 F.C.C.2d at 1027; Br. for Intervenor AT&T Information Systems Inc. at 41-42, *MCI Telecommunications Corp.* v. *FCC*, 799 F.2d 773 (D.C. Cir. 1986) (Table) (No. 84-1402).

The Commission denied AT&T's complaint insofar as AT&T sought damages for MCI's failure to file tariffs in the past. The Commission concluded that "it would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability." 93-356 Pet. App. 64a. The Commission dismissed AT&T's complaint insofar as it sought injunctive relief, concluding that "rulemaking proceedings are more appropriate for considering general rules of widespread applicability." *Id.* at 65a. Accordingly, the Commission simultaneously initiated a rulemaking proceeding, with an

expedited pleading cycle, to consider whether its permissive detariffing rules should be modified or repealed. AT&T appealed the denial of its complaint while the rulemaking proceeding went forward.

3. The Commission released its *Rulemaking Order*—the decision at issue in this case—in November 1992. The Commission retained the permissive detariffing rules and set forth a comprehensive analysis of the Commission's basis for those rules. 93-356 Pet. App. 3a-33a. The Commission acknowledged that Section 203(a) requires telephone companies to file tariffs and that Section 203(c) prohibits them from offering service without having filed tariffs. But the Commission also found that Congress had intended the agency to have flexibility under the statute to carry out its mandate under 47 U.S.C. 151 "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." See 93-356 Pet. App. 12a-21a. More specifically, the Commission emphasized that "under Section 203(b)(2) the Commission is granted equally explicit authority to 'modify *any requirement*'—save one—'made by or under authority of this section.'" 93-356 Pet. App. 13a. The Commission noted that "this section" refers to Section 203, and concluded that this modification power may be employed "to alter the tariff filing requirements of both subsections (a) and (c) of Section 203." 93-356 Pet. App. at 14a.

The Commission found further support for its reading of Section 203(b)(2) in the language of Section 203(c), which prohibits "providing service without a tariff * * * '*unless otherwise provided* by or *under*

authority of this Act.'" 93-356 Pet. App. 14a. The Commission concluded that Section 203(c) makes clear that Congress contemplated that service might be provided without a tariff in some instances where the Commission had authorized such service. *Ibid.*

The Commission also noted that Congress was well aware of its permissive detariffing policy, which by then had been in effect for more than ten years. 93-356 Pet. App. 23a. Rather than disapproving the policy, Congress in 1990 amended the Communications Act to require "operator service providers" (which include common carriers such as MCI and Sprint) to file tariffs covering their operator services, "while leaving the existing regulatory baseline intact." *Ibid.*; see 47 U.S.C. 226(h)(1)(A) (Supp. III 1991). Because that amendment—part of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA)—was "predicated upon a baseline of forbearance," the Commission found that TOCSIA supported its interpretation of the extent of the authority granted by the provision authorizing it to "modify any requirement" in Section 203.

Furthermore, after reviewing nearly ten years of experience with the permissive detariffing rules, the Commission concluded that those rules had encouraged competition in the market for long distance services and had increased customer choice with respect to carriers, services, and prices. 93-356 Pet. App. 26a-31a. Specifically, the Commission noted that "[i]n 1982, appproximately a dozen long distance carriers operated within the United States," while "[b]y March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers." *Id.* at 30a. The Commission also

found that "the record here confirms that but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered into the competitive fray at all." *Id.* at 29a. The rules thus served the Commission's mandate to make available efficient telecommunications services, while still allowing the agency to retain its ability to enforce the substantive rate-making provisions of the Act.

4. On November 13, 1992—eight days after the FCC announced the completion of the expedited rulemaking proceeding but 12 days before the Commission released its opinion—the D.C. Circuit issued its judgment on AT&T's petition for review of the Commission's action on AT&T's complaint against MCI. The court first decided that the Commission had abused its discretion by failing to resolve AT&T's challenge to permissive detariffing in that adjudicatory proceeding. 93-356 Pet. App. 44a-51a. The court then proceeded to consider the merits of the permissive detariffing rules established by the FCC. Although it was the mandatory detariffing policy established by the FCC's *Sixth Report* that had been at issue in 1985 in *MCI* v. *FCC* and the court there had "explicitly reserved holding on the permissive detariffing scheme," the D.C. Circuit now interpreted its decision in that case as invalidating the FCC's permissive detariffing policy as well as mandatory detariffing. 93-356 Pet. App. 53a. The court noted that in the 1985 decision the court had interpreted "modify" in Section 203(b)(2) as authorizing the Commission to make only "circumscribed alterations" in the requirements of Section 203. 93-356 Pet. App. 53a, quoting *MCI* v. *FCC*, 765 F.2d at 1192.

In the appeal arising from the adjudicatory proceeding, the court held that authority "to change in incidental or subordinate features" does not permit the Commission to relieve telephone companies "of the obligations to file tariffs under section 203(a)." 93-356 Pet. App. 53a (quoting *MCI* v. *FCC*, 765 F.2d at 1192).

AT&T sought review of the *Rulemaking Order* in the D.C. Circuit, and asked for summary reversal in light of the court's decision in the adjudicatory proceeding. The court of appeals granted AT&T's motion, stating that its decision in the adjudicatory proceeding "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." 93-356 Pet. App. 2a. Neither in that order, nor in its decision in the adjudicatory proceeding (see *id.* at 53a-54a), nor in its 1985 decision in *MCI* v. *FCC* (see 765 F.2d at 1191-1193) did the court respond to the FCC's arguments (1) that Section 203(b)(2) authorizes the Commission to alter "any requirement" of Section 203; (2) that Section 203(c) contemplates the provision of service without a tariff; or (3) that Congress enacted TOCSIA against the background of permissive detariffing. In addition, the court understood "fully why the Commission wants the flexibility to apply the tariff provisions of the Communications Act to AT&T * * * differently from the way it applies the tariff provision to other competing carriers," and it did "not quarrel with the Commission's policy objectives." 93-356 Pet. App. 54a. The D.C. Circuit based its decisions entirely on its conclusion that "modify" in Section 203(b)(2) authorizes only "circumscribed

alterations" of the requirements of Section 203. 93-356 Pet. App. 53a (quoting 765 F.2d at 1192).

5. MCI had filed a petition for a writ of certiorari seeking review of the D.C. Circuit's decision in the adjudicatory proceeding. The government opposed that petition, arguing that review would be premature until the court of appeals had the opportunity to review the *Rulemaking Order* and fully consider the Commission's justifications for its permissive detariffing policy. This Court denied MCI's petition in the adjudicatory proceeding. *MCI Telecommunications Corp.* v. *AT&T*, 113 S. Ct. 3020 (1993). After the D.C. Circuit summarily reversed the Commission's *Rulemaking Order*, the Court granted petitions for certiorari filed by MCI and the government.

SUMMARY OF ARGUMENT

Section 203(b)(2) broadly authorizes the Commission to "modify any requirement" of Section 203. "Modify" has at least two meanings—"to make minor changes in" or "to make basic or fundamental changes in." *Webster's Ninth New Collegiate Dictionary* 763 (1988). While the first definition is consistent with the D.C. Circuit's interpretation of Section 203(b)(2), the second definition is consistent with the Commission's reading of the statute. But the Commission's reading is preferable because it gives force to the phrase "any requirement." Under the D.C. Circuit's reading of "modify," the Commission may modify only "some" of the requirements of Section 203, not "any" requirement. Indeed, AT&T argues that the Commission may modify only requirements relating to "details" such as the form of tariff filings. Br. in Opp. 16. That constricted reading is not consistent with the broad language of Section 203(b)(2).

The Commission's reading of Section 203(b)(2) is also supported by Section 203(c), which states that "[n]o carrier, unless otherwise provided * * * under authority of this chapter," may offer telephone service in the absence of a tariff. That plainly envisions that the Commission has authority to "provide otherwise" and allow telephone companies to offer service without filing a tariff.

In addition, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) against the background of permissive detariffing, and that amendment to the Communications Act makes little sense if the Commission lacks authority to make the filing of tariffs optional. Congress enacted TOCSIA to require the filing of streamlined tariffs in limited circumstances involving the provision of operator services to guests of hotels and other institutions. S. Rep. No. 439, 101st Cong., 2d Sess. 23 (1990). Under AT&T's view, however, TOCSIA did not have that effect, but may impose duplicative tariff-filing requirements.

Contrary to AT&T's principal contention, its position is not supported, much less compelled, by *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). That case presented the question whether the Interstate Commerce Commission could excuse a trucker's deviation from rates that had been filed under the Interstate Commerce Act—not, as here, the question whether the requirement to file rates could be excused. Although the Interstate Commerce Act contains a provision that is similar to (but more limited than) Section 203(b)(2), it was undisputed that the provision authorizing the ICC to "change the other requirements of this section" (49

U.S.C. 10762(d)(1)) did not authorize the ICC to change the requirement that truckers follow their filed rates because that requirement is contained in a different Section of the Interstate Commerce Act. Thus, *Maislin* involved a different issue decided under a different statute. The Communications Act is similar in some respects but different with respect to the issue presented here.

The Commission's findings show that permissive detariffing has played a major role in encouraging competition in the long distance market. 93-356 Pet. App. 29a-30a, 54a. That achievement advances the Communication Act's broad purpose of promoting "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151.

The Commission's interpretation of Section 203 (b)(2) is entitled to deference. Indeed, this case parallels *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992), where the Court recognized that "[t]he existence of alternative dictionary definitions * * * indicates that the statute is open to interpretation" and deferred to the agency's construction. Moreover, the Communications Act is a "supple instrument" (*FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)) that grants broad discretion to the Commission with respect to numerous matters. It would be inconsistent with the statutory scheme to confine the term "modify any requirement" to the limited construction urged by AT&T.

ARGUMENT

CONGRESS AUTHORIZED THE FEDERAL COMMUNICATIONS COMMISSION TO MAKE THE TARIFF-FILING REQUIREMENT OPTIONAL FOR TELEPHONE COMPANIES LACKING MARKET POWER

The FCC's permissive detariffing policy has played a major role in fostering a competitive long distance market, and thus has promoted Congress's goal of fostering "efficient * * * service * * * at reasonable charges." 47 U.S.C. 151. The 1934 Congress that enacted the Communications Act could not have foreseen the technological advances that made competition feasible in the telecommunications market, but that Congress did not put the Federal Communications Commission in a regulatory straightjacket. Congress in 1934 not only provided for tariffs in order to restrain AT&T, which then had a monopoly over long distance service, but also, in Section 203(b)(2), granted the Commission broad authority to "modify any requirement made by or under the authority" of Section 203, the provision that established the tariff-filing requirement. The D.C. Circuit erred by invalidating the permissive detariffing policy, and thus removing "a cornerstone of the Commission's regulatory regime." 93-356 Pet. App. 8a.

A. Section 203(b)(2) Authorizes The Commission To "Modify Any Requirement" of Section 203, Including The Tariff-Filing Requirement

Section 203(b)(2) authorizes the FCC, "in its discretion and for good cause shown," to "modify any requirement made by or under the authority of this section either in particular instances or by general

order applicable to special circumstances or conditions." That is broad language: It grants the Commission discretion, it extends the modification power to "any" requirement of Section 203, and it authorizes modification either in individual cases or through general rules. And while Section 203(b)(2) speaks of "good cause" and of rules "applicable to special circumstances or conditions," the D.C. Circuit did not dispute that there is good reason for the Commission's permissive detariffing rules or that the introduction of competition into the long distance market is a special circumstance that was not foreseen in 1934. The only limit Congress has placed on the authority granted by Section 203(b)(2) is that the Commission "may not require the notice period [for changing tariff schedules] to be more than one hundred and twenty days." 47 U.S.C. 203(b)(2) (Supp. III 1991). The court of appeals, however, read "modify" in Section 203(b)(2) as granting only the "limited authority" to make "'circumscribed alterations.'" 93-356 Pet. App. 53a, quoting *MCI* v. *FCC*, 765 F.2d at 1192, quoting *Black's Law Dictionary* 905 (5th ed. 1979).

The D.C. Circuit's narrower reading of "modify" overlooks broader definitions of the same term in other dictionaries and, indeed, is not compelled by the dictionary on which the court relied. *Webster's*, for example, alternatively defines "modify" to mean "to make minor changes in" *or* "to make basic or fundamental changes in, often to give a new orientation to or serve a new end." *Webster's Ninth New Collegiate Dictionary* 763 (1988). And *Black's*, on which the court relied, primarily defines "modify" as "to alter," which means "to make a change in." *Black's Law*

Dictionary, *supra*, at 71. The FCC's permissive detariffing policy fits within that definition or the alternative definition given in *Webster's*.

In adopting its interpretation of the FCC's authority to modify the requirements of Section 203, the court of appeals focused on Section 203(a)'s requirement that "*Every* common carrier, except connecting carriers, *shall* * * * file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers * * * and showing the classifications, practices, and regulations affecting such charges." See *MCI* v. *FCC*, 765 F.2d at 1191. The court noted that "'[s]hall' * * * is the language of command" (*ibid.*) and concluded in this case that the FCC may not modify the tariff-filing requirement. The court failed to address, however, to *whom* Section 203(a) directs its command. Clearly, a telephone company may not exempt itself from the tariff-filing requirement of Section 203(a) and, in the absence of an order from the Commission modifying that requirement, "shall" file tariffs. But the Commission, whose authority is derived from Section 203(b)(2), does not face the same limitations and is not subject to any such language of command. Moreover, since five of the six sentences in Section 203 other than Section 203(b)(2) contain the verb "shall," and Section 203(b)(2) authorizes modification of the provisions of Section 203 only, Section 203(b)(2) would have little use unless it authorized the Commission to modify commands that would otherwise be imposed on telephone companies. Indeed, Section 203(b)(2) would have no substantial effect since the one sentence that does not contain "shall" grants the Commission

discretion by providing that "[t]he Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date." 47 U.S.C. 203(d). See also *Permian Basin Area Rate Cases*, 390 U.S. 747, 786-787 (1968) (upholding a decision by the Federal Power Commission to relieve small natural gas producers "from various filing and reporting obligations" that were imposed "without exception or qualification," pursuant to a provision authorizing the agency to "'prescribe different requirements for different classes of persons or matters'") (quoting 15 U.S.C. 717(*o*)).

The court of appeals also failed to appreciate that Section 203(b)(2) explicitly authorizes the Commission to modify "any" requirement of Section 203. The primary requirement of Section 203 is that telephone companies must file tariffs. If the authority to "modify any requirement" has meaning with respect to the tariff-filing requirement, it authorizes the Commission to relieve some carriers of that requirement. Under the D.C. Circuit's reading of "modify," however, relieving carriers of the tariff-filing requirement exceeds the Commission's "limited authority" to make "circumscribed alterations." 93-356 Pet. App. 53a (quoting *MCI* v. *FCC*, 765 F.2d at 1192). The D.C. Circuit's interpretation thus allows the Commission to modify only *some* of Section 203's requirements: specifically, those rules pertaining to minor details. The statutory text, however, mandates that the FCC be allowed to modify *any* requirement of Section 203.

For that reason, the Commission's reading of Section 203(b)(2) is more faithful to the statutory text

than the D.C. Circuit's reading. Although "modify" may have two meanings—"to make minor changes" *or* "to make basic or fundamental changes" (*Webster's*, *supra*, at 763)—by choosing the more limited meaning, the D.C. Circuit has read the word "any" out of the statute. In fact, the Commission may hardly modify Section 203 at all under the D.C. Circuit's reading, since the tariff-filing requirement of Section 203(a) is off limits and the requirement of Section 203(c) that telephone companies provide service only in accordance with tariffs presumably may not be modified either. Under the Commission's reading of "modify," in contrast, "any" means what it says. Thus, although "modify" might reasonably be construed in other contexts to grant only the power to make "circumscribed alterations," that construction is not tenable here, where such a limited meaning nullifies the remainder of the statutory phrase.

Moreover, the court of appeals misconstrued the scope of the Commission's action. Permissive detariffing does not, as the court of appeals described it, mark the "wholesale abandonment or elimination" of Section 203(a)'s tariff-filing requirement. See 978 F.2d at 736. Rather, it does no more than "alter in the direction of moderation or lenity" the regulatory burden imposed upon a subset of telephone companies. See 6 *Oxford English Dictionary* 576, entry 2 (1933 & reprint 1978). Dominant carriers comprising 99% of the interstate access market (local exchange carriers) and 60% of the interstate, domestic long-distance market (AT&T) still must file tariffs for all their services. Non-dominant carriers themselves *may* file tariffs for all their services, and they *must* continue to file tariffs for their international long-distance

services. See *International Competitive Carrier Policies*, 102 F.C.C.2d 812 (1985). And the Commission retains the power to "reimpos[e] * * * the tariff filing requirement" in the "unlikely event" that market forces and the complaint process do not adequately protect the public interest. *Second Report*, 91 F.C.C.2d 59, 70 (1982); see 93-356 Pet. App. 27a-28a. Thus, even if, as the court of appeals believed, the Commission's authority to "modify" the tariff-filing requirement would not allow it to eliminate that requirement altogether, the Commission's action here should be upheld.

B. Section 203(c), Which Prohibits Untariffed Telephone Service "Unless Otherwise Provided * * * Under Authority Of This Chapter," Supports The Commission's View That It May Authorize Untariffed Service

The Commission's interpretation of the phrase "modify any requirement" is supported by Section 203(c), which explicitly anticipates that the Commission may authorize carriers to provide untariffed service. The first clause of Section 203(c) provides that "[n]o carrier, *unless otherwise provided* by or *under authority of this chapter*, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder." 47 U.S.C. 203(c) (emphasis added). That plainly envisions that, "under authority" of the Communications Act, the FCC may relieve telephone companies of the tariff-filing requirement. In our view, such authority is granted by Section 203(b)(2).

AT&T has advanced three arguments in support of its contention that Section 203(c) does not support the

Commission's interpretation of "modify any requirement." First, AT&T notes that, following the language quoted above, Section 203 goes on to prohibit the charging of rates other than those filed in tariffs. "This clause is unqualified," AT&T claims. Br. in Opp. 16. But that is not so. The clause to which AT&T refers, Section 203(c)(1), prohibits the charging of rates other than those specified "in any such schedule," which in itself contemplates that there might or might not be a tariff. Indeed, the clause prohibiting the charging of rates other than those specified "in any such schedule" is part of the sentence prohibiting telephone service in the absence of tariffs "unless otherwise provided by or under authority of this chapter" and should be read in light of that clause. Thus, the language in Section 203(c) on which AT&T relies more reasonably is interpreted to mean that if a telephone company files a tariff, it may not charge "a greater or less or different" rate.

Second, AT&T argues that the phrase unless "otherwise provided by or under authority of this Act" does not refer to Section 203(b)(2), but instead refers to two other provisions of the Act. Br. in Opp. 16 n.14. One of those provisions is Section 203(a), which states that "connecting carriers" are not required to file tariffs. The other is 47 U.S.C. 211, which requires telephone companies to file copies of their contracts with other telephone companies, but also authorizes the Commission to grant exceptions to that requirement. While the "unless otherwise provided" clause in Section 203(c) may refer to those two provisions as well as to Section 203(b)(2), AT&T has advanced no reason why the phrase should apply to Sections 203(a) and 211 but not to Section

203(b)(2)—which, as we have explained, expressly authorizes the Commission to "modify any requirement" of Section 203.

AT&T also finds support in the portion of Section 203(c) stating that, "unless otherwise provided," telephone service may be furnished only if tariffs have been filed and published "in accordance with the provisions of this Act and with the regulations made thereunder." That shows, in AT&T's view, that the phrase "unless otherwise provided" in Section 203(c) does not address what AT&T terms "the core [tariff] filing requirements," but only "details." Br. in Opp. 16. That is hardly the most natural reading of the phrase. It is more naturally read as authorizing the Commission to modify the filing requirement, the publication requirement, and the secondary requirements relating to filing and publication.

C. Congress Has Amended The Communications Act With The Understanding That Non-Dominant Telephone Companies Are Not Required To File Tariffs

The Commission also noted in the order at issue in this case that "Congress has demonstrated its awareness of the Commission's forbearance policy and made no attempt to disturb it." 93-356 Pet. App. 23a. As the Commission explained, in the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), Congress responded to consumer complaints about a class of non-dominant carriers providing "alternative operator services" (AOS). Congress found that AOS companies were paying hotels and other institutions a percentage of their revenues if the institution would route all calls starting with a "0" through them. Moreover, the

caller would not necessarily know that the call was being handled by the AOS (which might accept a calling card number issued by another company) until the caller received a bill, which might be "several times higher than the prices charged by AT&T." *Id.* at 3. Congress determined that some AOS companies had been "tak[ing] advantage of the customer's captive status" in hotels and other institutions and "engaging in deceptive and unreasonable practices." *Id.* at 2.

In response, Congress enacted, among other provisions, 47 U.S.C. 226(h)(1)(A) (Supp. III 1991), which requires each AOS provider to file "an informational tariff specifying rates." The Senate Report recognized that "AOS carriers are considered 'non-dominant' carriers" and that "[t]he FCC has chosen to 'forbear' from regulating the rates of 'non-dominant' carriers because they do not possess market power and thus have little ability to charge unjust or unreasonable rates." S. Rep. No. 439, 101st Cong., 2d Sess. 3 & n.10 (1990). Congress did "not expect that these informational tariffs would require the same amount of supporting documentation as required of most dominant carriers," and it authorized the FCC to waive the informational tariff requirement after a few years. *Id.* at 23; 47 U.S.C. 226(h)(1)(B).

Thus, Congress acted "upon a baseline of forbearance." 93-356 Pet. App. 25a. Moreover, what it enacted would make little sense in the absence of permissive detariffing. The informational tariffs required under TOCSIA "substantially overlap in scope and purpose the tariff filings provided for in Section 203." *Id.* at 23a. For instance, Section 226(h)(1)(A) provides that AOS providers "shall file

* * * an informational tariff specifying rates, terms, and conditions" for operator services, while Section 203(a) requires common carriers to file tariffs that include "charges" and "classifications, practices, and regulations affecting such charges." See 93-356 Pet. App. 23a-24a. And while Congress expected the informational tariffs filed under Section 226 to be less burdensome than the tariffs required to be filed under Section 203(a), it also required AOSs to provide some information that Section 203 does not require, as AT&T has stressed. Br. in Opp. 18 n.16. But if permissive detariffing is not authorized by Section 203(b)(2), then the net effect, which would be directly contrary to Congress's expressed intention, may be that common carriers acting as AOSs must comply with both Section 203(a) and Section 226(h) (Supp. III 1991), so that tariffing burdens would be increased. Alternatively, it may be that, under AT&T's view, common carriers providing alternative operator services need only file the streamlined tariffs required under Section 226 while that tariffing requirement is in effect. But that alternative would appear to undermine the Commission's authority to waive the Section 226 requirement, expressly conferred by the 1990 amendment, since the common carriers presumably would then have to file more burdensome tariffs under Section 203 with respect to alternative operator services. That is, a conclusion that tariffs are no longer needed for AOS providers would trigger the imposition of more burdensome tariffing requirements, unless the Commission is authorized to relieve common carriers of the requirement that tariffs be filed under Section 203(a) or modify the requirements of those tariffs to a significant extent.

AT&T also emphasizes (Br. in Opp. 18 n.16) that Section 226 does not apply only to common carriers that are subject to Section 203(a), but also to some "other person[s] determined by the Commission to be providing operator services." 47 U.S.C. 226(a)(9) (Supp. III 1991). However, while the Commission has authority to subject some persons to Section 226 that are not governed by Section 203, TOCSIA clearly was designed to address a problem created by a narrow class of non-dominant long distance companies whose rates for captive customers were not disclosed in any tariff. S. Rep. No. 439, *supra*, at 2 n.3. But Congress did not indicate that it was requiring common carriers such as MCI and Sprint to make largely duplicative filings with respect to alternative operator services or that it thought that those carriers would have to comply with Section 203(a) if the Section 226 tariff were waived by the FCC. Congress thought that those companies were not required to file tariffs on account of the Commission's permissive detariffing policy, and Congress enacted Section 226(h) (Supp. III 1991) in order to require them to file streamlined tariffs with respect to alternative operator services.

Particularly since the language of Section 203 will "bear the interpretation adopted by the agency" (*Sullivan* v. *Everhart*, 494 U.S. 83, 92 (1990)), Congress's acquiescence in permissive detariffing, while amending the statute in other respects, confirms the reasonableness of the FCC's interpretation of its authority. See *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 983 (1986) ("'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one

intended by Congress.' *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)."); see also *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990); *United States* v. *Riverside Bayside Homes, Inc.*, 474 U.S. 121, 132, 137 (1985); *United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979). Moreover, this Court has recognized the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). Under that rule of construction, TOCSIA should not be interpreted together with the Communications Act of 1934 to subject common carriers providing alternative operator services to tariffing requirements under both Section 203 and Section 226.

AT&T also has noted Congress's recent amendment of 47 U.S.C. 332(c)(1)(A) granting the FCC authority to limit the tariff-filing requirements for commercial mobile carriers, which include most providers of cellular services. See *Notice of Proposed Rulemaking*, 8 F.C.C. Rcd. 7988, 7996 (1993). AT&T suggests that the 1993 amendment shows that Congress does not think that the Commission has authority under Section 203(b)(2) to modify the tariff-filing requirement. Br. in Opp. 17. To the contrary, the 1993 amendment of Section 332(c) does not support AT&T's position. As part of the Omnibus Budget Reconciliation Act of 1993, Congress amended the Communications Act to establish "uniform rules to govern the offering of all commercial mobile services." H.R. Rep. No. 111, 103d Cong., 1st Sess. 259 (1993). Congress stated that it was "aware that the Commission's long-standing policy of permissive detariffing, applied to non-dominant carriers, was

recently found to be outside the scope of the Commission's authority under Section 203 of the Communications Act" by the D.C. Circuit. *Id.* at 260. Congress accordingly granted the Commission express authority, with respect to the problem it was dealing with at the time, to "'specify' which provisions of Title II of the Communications Act are not applicable to persons engaged in the provision of commercial mobile services," so that the Commission could reinstate the permissive detariffing policy with respect to those persons despite the D.C. Circuit's decision. *Ibid.* That hardly shows congressional hostility toward the Commission's permissive detariffing policy. Nor does the rule that statutes should be interpreted to make sense in combination support AT&T's position, since the amendment to Section 203(c)(1) and the Commission's permissive detariffing policy are harmonious. Indeed, what the 1993 amendment shows is congressional disapproval of the D.C. Circuit's decision, as applied to the problem Congress was addressing.

D. The Commission's Permissive Detariffing Policy Is Consistent With This Court's Decision In *Maislin*

Although the D.C. Circuit cited this Court's decision in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), in a footnote and said that its decision was "somewhat buttressed" by that case (93-356 Pet. App. 53a n.12), AT&T has placed primary reliance on *Maislin*. Br. in Opp. 9-14. That reliance is misplaced. In *Maislin*, this Court held that the Interstate Commerce Commission could not excuse a trucker's deviation from its filed rates. Thus, *Maislin* involved a different issue (whether

truckers must follow rates that have been filed, rather than whether the FCC may relieve non-dominant long-distance companies from filing tariffs) decided under a different statute (the Interstate Commerce Act rather than the Communications Act).

Nor does closer analysis suggest that *Maislin* compels—or even supports—AT&T's position. AT&T argues that the Interstate Commerce Act sets out requirements that are comparable to those in Section 203 of the Communications Act: Truckers must file tariffs (49 U.S.C. 10762(a)) and may not provide service except at the rate specified in the applicable tariff (49 U.S.C. 10761(a)), and 49 U.S.C. 10762(d)(1) provides that the ICC "may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances." Section 10762(d)(1), the provision that is similar to Section 203(b)(2) of the Communications Act (though not as broad, since it does not provide that the ICC may modify "any" requirement and does not authorize modification "by general order"), was not at issue in *Maislin*. That is because the structure of Section 203 of the Communications Act differs from the structure of Sections 10761 and 10762 of the Interstate Commerce Act. The modification provision of the Interstate Commerce Act, Section 10762(d)(1), authorizes the ICC to change the other requirements "of this section"—that is, Section 10762. Although the filing requirement is set out in Section 10762(a), the requirement that truckers follow the tariffs they have filed is set out in another Section, Section 10761(a), so Section 10762(d)(1) does not authorize the ICC to modify that requirement. Accordingly, the ICC did not argue in *Maislin* that

Section 10762(d)(1) gave it authority to modify the requirement that was at issue in *Maislin*. Section 10762(d)(1) was mentioned in the Court's decision only in a footnote relating to a tangential point. See 497 U.S. at 134 n.14. Accordingly, as the FCC explained (93-356 Pet. App. 16a), *Maislin* "is not dispositive here."

In addition, the Commission noted (93-356 Pet. App. 17a-18a) that the Court in *Maislin* had relied on an amendment to the Interstate Commerce Act that allowed the ICC "to exempt motor *contract* carriers from the requirement that they adhere to the published tariff, see 49 U.S.C. § 10761(b) (1982 ed.), demonstrating that Congress is aware of the requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers." 497 U.S. at 135. Here, in contrast, TOCSIA supports the FCC's view that Congress is aware of permissive detariffing and has premised an amendment of the Communications Act on the FCC's permissive detariffing policy. 93-356 Pet. App. 18a.[1]

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[1] There are, moreover, differences in the regulatory policies underlying the tariff-filing requirements in the two industries. The Communications Act of 1934 was enacted in the context of AT&T's almost complete monopoly power over the telephone industry. See S. Rep. No. 781, *supra*, at 2; 78 Cong. Rec. 10,315 (1934) ("[t]he competition in the industry will run about as follows: Telephone: American Telephone & Telegraph Co., 95 percent of the business; 100 independent companies, 5 percent of the business") (statement of Rep. Rayburn). Accordingly, Congress required AT&T to file tariffs to provide the FCC with the information needed to ensure that the monopoly charged only reasonable rates. See 78 Cong. Rec. 10,315 (1934) (statement of Rep. Rayburn). Collective ratemak-

E. Permissive Detariffing Implements Congress's Goals In Enacting the Communications Act

As the Commission noted when it initiated its review of the effects of the tariff-filing requirement on non-dominant carriers in 1979, three-quarters of the challenges to tariffs came from competitors rather than customers. The Commission accordingly concluded that "it is apparent that these petitions are being used by competitors as a dilatory tactic to postpone commencement of service or rate changes by

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ing by competitors has never been authorized under the Communications Act.

By contrast, collective ratemaking was authorized and utilized in the transportation industry under the Motor Carrier Act of 1935, 49 Stat. 543. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 66, 70 (1985) (Stevens, J., dissenting) ("Congress * * * decided, as a matter of policy, that some price fixing should be permitted in the transportation industry, and enacted the Reed-Bulwinkle Act of 1948 to effectuate that policy choice"); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80-84 (1944) (detailing Congress's efforts to limit competition in the transportation industry).

Accordingly, rules developed in the context of the transportation industry should not necessarily be applied to the communications industry. See *United States* v. *American Union Transport, Inc.*, 327 U.S. 416, 455 (1946) (declining to construe language in the Shipping Act in light of similar language in the Interstate Commerce Act on account of "the quite different wording, coverage, history and, to some extent, policy of the Shipping Act"); *General Telephone Co.* v. *United States*, 449 F.2d 846, 856 (5th Cir. 1971) ("[w]hile the similarities between the two sections [47 U.S.C. 214 and Section 1(18) of the Interstate Commerce Act] are unquestionable, it must be emphasized that the functions of the Interstate Commerce Commission * * * are entirely different than those of the Federal Communications Commission").

competing carriers." *Competitive Carrier*, 77 F.C.C.2d 308, 314 (1979). After further study, the FCC concluded in 1981 that "the requirement that firms post their prices makes it difficult for those same firms to bargain with their customers over rates or to adjust them quickly to market conditions." *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 454 (1981). In particular, the Commission stated, tariff filings make it difficult to provide discounts that would otherwise be offered. *Ibid.* Moreover, by filing petitions objecting to the tariffs, competitors may impose "substantial legal costs" on firms that offer discounts. *Ibid.* The expenses caused by tariffs are particularly burdensome on new entrants to the market, the Commission found. *Id.* at 453.

The Commission further concluded that "[t]ariff posting also provides an excellent mechanism for inducing noncompetitive pricing." 84 F.C.C.2d at 454. The Commission explained that the tariff-filing requirement makes all price reductions public, which means that "they can be quickly matched by competitors," thus "reduc[ing] the incentive to engage in price cutting" in the first place. *Ibid.* The Commission concluded that regulated competition pursuant to tariffs "all too often becomes cartel management." *Ibid.* Moreover, the Commission continued, the original justification for tariffing under the Communications Act—preventing a monopolist from extracting excessive profits—does not apply to firms lacking market power, since "non-dominant firms are unable to do what the rules are designed to prevent them from doing anyway." *Id.* at 454-455. In short, "[a]pplying the tariff requirements to competitive entities * * * has worked the perverse effect of

imposing a measure which (1) is superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation." *Id.* at 478-479. See *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (duty of affirmative disclosure of prices may frustrate competitive bidding and lead to price matching and anticompetitive cooperation among sellers).

Thus, once entrants to the telecommunications market had begun to transform that market from a monopoly to competition, the Commission's policy of detariffing was essential to fulfilling its statutory charge to ensure "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151. Failing to modify the tariff-filing requirement in light of the market changes would have been inconsistent with Congress's goals. Accordingly, the Commission issued a "general order" under Section 203(b)(2) exempting carriers in "special circumstances," *i.e.*, lacking market power, from the tariff-filing requirement.

The Commission's detariffing policy has been a notable success in achieving its statutory charge to deliver "rapid, efficient * * * communications service with adequate facilities at reasonable charges." 47 U.S.C. 151. Upon reviewing its policy in 1992, the Commission concluded that the evidence introduced in the rulemaking proceeding confirmed the findings it had made 11 years earlier. From 1982 to 1992, the number of long distance carriers had increased from about 12 to about 482. 93-356 Pet. App. 30a. And the

market had become more competitive—while AT&T remained dominant, its share of the market had declined from 80% to 60%. *Id.* at 31a. The evidence specifically showed that the permissive detariffing policy had played a major role in fostering competition in the long distance market. Some nondominant carriers testified that the absence of tariffing requirements had allowed them to enter "niche markets" for the provision of long distance service to businesses, and that they "likely would not have entered into the competitive fray at all" had they been subjected to tariffing. *Id.* at 29a & n.113. The Commission concluded, as a policy matter, "that the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers." *Id.* at 29a. The court of appeals did not quarrel with that conclusion. *Id.* at 54a.[2]

At the same time, the Commission has not relieved any telephone company of the requirements that rates be just and reasonable (47 U.S.C. 201(b)), and not unreasonably discriminatory (47 U.S.C. 202(a)). See *Rulemaking Order*, 7 F.C.C. Rcd. 8072, 8079 (1992). The FCC retains its powers to investigate and

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[2] As for AT&T, the Commission in a recent rulemaking proceeding streamlined the tariffs it must file on account of the development of competition in the interstate long distance market. *Interexchange Rulemaking*, 6 F.C.C. Rcd. 5880 (1991), reconsidered, 7 F.C.C. Rcd. 2677 (1992), petition for review pending, 93-1306 (D.C. Cir.). However, because AT&T remains dominant in that market and AT&T's share of some important submarkets (such as 800 service) continues to be large enough to give it an advantage over its competitors with respect to other services, the Commission retained the tariff-filing requirement for AT&T.

prescribe all carriers' rates, and to order refunds in some circumstances. 47 U.S.C. 205 (1988 & Supp. III 1991); see *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989). The FCC also remains open to adjudicate complaints that a non-dominant (as well as dominant) carrier's rates are unlawful, and to require such carriers to pay damages or to cease and desist from unlawful conduct. 47 U.S.C. 207-209. In such a proceeding concerning the lawfulness of untariffed rates, discovery procedures are available to obtain pertinent information. *Rulemaking Order*, 7 F.C.C. Rcd. at 8079 n.108 (citing 47 C.F.R. 1.729-1.730). Thus, although competition should ensure that non-dominant carriers' rates are reasonable, the Commission may respond to abuses that may arise.

F. The Commission's Interpretation Of Section 203 Of The Communications Act Is Entitled To Deference

The court of appeals' ruling conflicts with the "dominant, well-settled principle of federal law" requiring "judicial deference to reasonable interpretations by an agency of a statute it administers." *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-1402 (1992); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-844 (1984). Under that standard, the first inquiry is whether the statute reveals an "unambiguously expressed intent of Congress" on the "precise question" addressed by the FCC's interpretation. *Chevron*, 467 U.S. at 843. If it does, that ends the inquiry. *Id.* at 842-843. However, "[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation

when applied in a real context." *National R.R. Passenger Corp.*, 112 S. Ct. at 1402. "If the agency interpretation is not in conflict with the plain language of the statute, deference is due" (*id.* at 1401), and courts must uphold the agency's construction so long as it is "reasonable" (*Chevron*, 467 U.S. at 844). Such deference recognizes that "the resolution of ambiguity in a statutory text is often more a question of policy than of law," and therefore properly "reflects a sensitivity to the proper roles of the political and judicial branches." *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); see also *Chevron*, 467 U.S. at 865-866 ("it is entirely appropriate for th[e] political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities").

This case is similar to *National R.R. Passenger Corp.* There, the crucial issue was the meaning of the word "required" in a provision of the Interstate Commerce Act. The D.C. Circuit held that "required" meant "necessary or indispensable" and rejected the ICC's interpretation that it meant "useful or appropriate." 112 S. Ct. 1401-1402. This Court acknowledged that the D.C. Circuit's view was "not without support," but noted that alternative dictionary definitions supported the ICC's construction. *Id.* at 1402. The Court stated that "[t]he existence of alternative dictionary definitions of the word 'required,' each making some sense under the statute, itself indicates that the statute is open to interpretation," and deferred to the ICC's interpreta-

tion of the word. *Ibid.* In this case, as we have explained, "modify" has alternative meanings. In our view, "modify" is better read in the context of the Communications Act as the Commission has read it. But in any event, the Commission's interpretation is at least reasonable, and the Court should uphold the agency's interpretation in this case, just as it did in *National R.R. Passenger Corp.* See also *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985) (the Court held that "[t]he word 'modify' thus has no plain meaning as used in" an environmental statute, and deferred to the EPA's construction of the term).

Moreover, it does not appear that the D.C. Circuit has adequately considered whether to pay deference to the Commission's interpretation of the word "modify." The 1985 decision concerning mandatory detariffing, in which the court said that modify "suggest[s] 'circumscribed alterations'" (93-356 Pet. App. 53a, quoting 765 F.2d at 1192), did not cite *Chevron* or otherwise discuss deference principles. See 93-356 Pet. App. 52a & n.11. Moreover, the court recognized in 1992 that the Commission's interpretation of "modify" was "not insubstantial when made initially." *Id.* at 52a. In our view, the Commission's interpretation is at least reasonable, and therefore is entitled to deference. AT&T claims that Section 203(b)(2) is "unambiguous" and grants the FCC only the limited power to modify "details" relating to matters such as the "content and form of tariff schedules." Br. in Opp. 16, 17. While we think that claim is unsupportable, it is noteworthy that AT&T recognizes that it should prevail only if this Court concludes that the authority to "modify any requirement" of Section 203 unambiguously means what AT&T says it means—that the Commission has authority only to modify details relating to the form of tariff schedules.

The FCC's reading of "modify" also comports with the general breadth of Congress's grant of authority to the Commission under the Communications Act. That Act contains a "necessary and proper" clause (*New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989)) comprehensively authorizing the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions" (47 U.S.C. 154(i)). Broadly delegated discretion is apparent, as well, in the common carrier provisions of Title II, 47 U.S.C. 201 *et seq.* For example, Section 204(a) of the Act, 47 U.S.C. 204(a), grants the agency unreviewable discretion to decide whether to suspend and investigate a rate before it takes effect, to investigate the rate without suspension, or simply to let it take effect without either suspension or investigation. See *Aeronautical Radio, Inc.* v. *FCC*, 642 F.2d 1221, 1234-1235 (D.C. Cir. 1980), cert. denied, 451 U.S. 920, 976 (1981); *American Broadcasting Cos.* v. *FCC*, 682 F.2d 25, 30 (2d Cir. 1982); *Maine Public Advocate* v. *FCC*, 828 F.2d 68, 69 (1st Cir. 1987). If the Commission chooses to invoke its authority under Section 204 to suspend and investigate, it has still further discretion in determining whether to order refunds in connection with rates found to be unlawfully high. *Las Cruces TV Cable* v. *FCC*, 645 F.2d 1041, 1047-1048 (D.C. Cir. 1981). And Section 205 of the Act, 47 U.S.C. 205,

grants the FCC "sole discretion" whether or not to prescribe a rate following investigation. *National Association of Motor Bus Owners* v. *FCC*, 460 F.2d 561, 565 (2d Cir. 1972).

In short, Congress vested in the FCC sufficiently flexible powers to carry out—in the face of changing circumstances—the Act's broad purpose of promoting "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151. As this Court long ago recognized, the Communications Act is "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); see also *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-173 (1968). In this context, it is apparent that Section 203(b)(2) is a similar reflection of Congress's determination to authorize the Commission to adapt the requirements of the Act to changing circumstances. There is no sound reason to believe that in a "supple instrument" containing a "necessary and proper" clause and other grants of broad discretion, Congress simultaneously meant its grant of authority to "modify any requirement" of Section 203 to be limited to the inconsequential authority to alter only details relating to the form of tariff schedules.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

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v.

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF JOINT RESPONDENTS IN SUPPORT OF PETITIONERS

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RULE 29.1 STATEMENT

The Association for Local Telecommunications Services ("ALTS") is a non-profit national trade organization representing the competitive access industry. ALTS' members include over 25 competitive access providers ("CAPS") operating as nondominant carriers, which deploy independently financed networks using state-of-the-art technologies to serve the needs of interexchange carriers (IXCs) and users in over 45 metropolitan areas across the country.

The Competitive Telecommunications Association ("CompTel") is a trade association of approximately 120 common carriers providing domestic and international long distance telecommunications services, and their suppliers. CompTel has not issued shares or debt securities to the public. CompTel does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Sprint Communications Company L.P. ("Sprint") is a limited partnership organized for the purpose of engaging in the provision of domestic and foreign telecommunications. Sprint is wholly owned by subsidiaries of Sprint Corporation (formerly United Telecommunications, Inc.), a publicly traded corporation.

The following affiliates of Sprint have issued shares or debt securities to the public: Carolina Telephone and Telegraph Company, United Telephone Company of Florida, United Telephone Company of Ohio, United Telephone Company of Pennsylvania, United Inter-Mountain Telephone Company, Centel Corporation, Central Telephone Company, and Centel Capital Corporation.

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF JOINT RESPONDENTS IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

The Association for Local Telecommunications Services, the Competitive Telecommunications Association, and Sprint Communications Company L.P., herein "Joint Respondents," hereby submit their brief in support of Petitioners urging reversal of the decision of the United States Court of Appeals for the District of Columbia Circuit. The Joint Petitioners adopt the questions presented

and statements of jurisdiction set forth in the petitions for *certiorari* in these consolidated cases.

STATEMENT OF THE CASE

Beginning in the late 1960s, technological advances brought about the previously unanticipated feasibility of competition in the long-distance portion of telephone service. The Federal Communications Commission ("FCC" or "Commission") determined that the congressional policy expressed in the Communications Act could best be carried out by permitting and encouraging such competition.

As competition developed, the FCC determined as a matter of policy to distinguish between two classes of communications common carriers: dominant and nondominant.[1] AT&T, which carried virtually all long distance traffic until the late 1970s and still controls at least 60 percent of the long distance market,[2] was classified as dominant, while MCI, Sprint, and numerous other small long distance and local access companies have been classified as nondominant. The FCC determined, again as a matter of policy, to apply more rigorous tariff regulation to dominant carriers than to nondominant carriers in light of the public interest in containing the market power of the dominant carriers.[3]

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[1] *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor*, 77 F.C.C.2d 308, 309 (1979) (*"Competitive Carrier Notice"*); *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor*, 85 F.C.C.2d 1, 20-22 (1980) (*"First Report and Order"*).

[2] Federal Communications Commission, *Long Distance Market Shares: Third Quarter, 1992* (Staff Report, Rel. Jan. 8, 1993).

[3] *Competitive Carrier Notice*, 77 F.C.C.2d at 313-14, 358-59; *First Report and Order*, 85 F.C.C.2d at 1-12; *In re Policy and Rules Concerning Rates for Competitive Carrier Serv. and Facilities Authorizations Therefor*, 91 F.C.C.2d 59, 59-73 (1982) (*"Second Report and Order"*), *recons. denied*, 93 F.C.C.2d 54 (1983).

AT&T has long been unhappy with this regulatory regime because, under it, AT&T is regulated more closely than its competitors. AT&T has therefore maintained steady pressure on the FCC in an effort to undermine or overturn this regulatory structure.[4] AT&T continually sought nondominant treatment from the FCC.[5] But, failing to achieve that objective, and after permissive detariffing had been in place for seven years, AT&T decided to challenge the FCC's tariffing policy as applied to nondominant carriers. The vehicle AT&T selected for that challenge was an administrative complaint at the FCC against its largest competitor, MCI.

The FCC recognized AT&T's complaint as an attack on its permissive detariffing policies, and chose to consider that attack in the context of rulemaking rather than adjudication. AT&T sought judicial review of that choice and obtained instead a ruling that the permissive detariffing policy itself was unlawful. The FCC's contemporaneous reaffirmation in rulemaking of its permissive detariffing policy was then summarily reversed by the Court of Appeals for the District of Columbia Circuit in reliance on its earlier decision that permissive detariffing was unlawful. The lawfulness of permissive detariffing under section 203 of the Communications Act of 1934, *as amended* 47 U.S.C. § 203 (1988 & Supp. 1991), is now before this Court on *certiorari*.

Section 203(a) requires, *inter alia*, that common carriers "shall file" with the FCC schedules showing the interstate and foreign communications services which they offer and the rates which they charge for such services. However, section 203(b)(2) empowers the FCC "in its discretion and for good cause shown" to "modify any re-

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[4] *See, e.g., In re Competition in the Interexchange Marketplace*, 6 F.C.C.R. 5880 (1991) (granting AT&T greater regulatory flexibility in the offering of some types of services, including contract offerings with large business users).

[5] *See, e.g.*, AT&T comments in FCC CC Docket Nos. 83-1147, 86-421, 87-313, 90-132, 92-143, and 93-197.

quirement" of section 203 (with one exception, *see* p. 18 *infra*) "either in particular instances or by general order applicable to special circumstances or conditions." The FCC's tariff forbearance rule adopted in the *Rulemaking Order* at issue [6] modified the tariff filing requirement by permitting nondominant carriers (*i.e.*, carriers lacking in market power) subject to forbearance regulation to offer their domestic services without filing tariffs.

A. Evolution Of The Permissive Detariffing Policy

Permissive detariffing had its genesis almost fifteen years ago when, in 1979, the FCC initiated its *Competitive Carrier* rulemaking proceeding [7] to adjust its regulatory policies to reflect the emergence of nascent competition in the telecommunications industry. Prior to the 1970s, virtually all interstate communications services were provided by AT&T through its then-existing Bell System Operating Companies and in cooperation with independent telephone companies. *In re Tariff Filing Requirements for Interstate Common Carriers,* 7 F.C.C.R. 8072 (1992); Pet. App. 5a. However, in the 1970s, due in large part to advances in technology and FCC decisions finding that competitive entry would further the fundamental purposes of the Communications Act, new carriers began to offer various types of communications services and to compete, for the first time, in the monopoly preserve of AT&T.

Unlike AT&T, its Bell System subsidiaries, and other traditional providers of local exchange services, these emerging competitive carriers did not possess and could not exercise market power. Thus, the FCC found that the application of tariffing rules developed to regulate monopoly carriers was not necessary to ensure compliance by

[6] *In re Tariff Filing Requirements for Interstate Common Carriers,* 7 F.C.C.R. 8072 (1992) ("*Rulemaking Order*"); Pet. App. 3a-36a.

[7] *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefore,* CC Docket No. 79-252 (1979).

the new competitive entrants with the substantive requirements of the Comunications Act. Relying upon well-established economic principles, the FCC determined that there was no real danger that these new carriers entering the telecommunications market, given their lack of market power, would be able to commit any of the harms against which the traditional tariffing rules were intended to guard. These firms could not charge excessive prices or collect monopoly rents, could not engage in predation against the dominant firm as a realistic market strategy, and would have no incentive or ability to engage in unlawful discrimination. In short, these carriers would not be able to violate sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b) and 202(a) (1988). *See In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor,* 77 F.C.C.2d 308, 334-338 (1979) ("*Competitive Carrier Notice*"); *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor,* 85 F.C.C.2d 1, 31-33 (1980) ("*First Report and Order*").

In these circumstances, it was further apparent that continued application of the dominant carrier regulatory scheme to carriers without market power would, as a policy matter, serve no purpose. On the contrary, such a requirement might make matters considerably worse. Apart from the useless paperwork involved, applying traditional dominant carrier regulation to carriers without market power would interfere with the workings of an emerging competitive marketplace by, for example, discouraging price cuts or facilitating collusion. This interference, the agency found, could impede the progress of competition itself and thus directly conflict with the FCC's overriding statutory mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151 (1988).

In order to avoid these consequences, the FCC was understandably anxious to modify to the maximum extent unnecessary tariff and other regulation of carriers without market power. Nonetheless, the FCC moved cautiously and carefully. Initially, in its *First Report and Order* in *Competitive Carrier*, the FCC established dominant/nondominant carrier classifications and simply streamlined some of the paperwork burdens associated with the then-prevailing tariff and entry/exit rules for nondominant carriers. 85 F.C.C.2d at 3.

Shortly thereafter, in *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 84 F.C.C.2d 445 (1981) ("*Further Notice of Proposed Rulemaking*"), the FCC proposed more substantial modifications of its regulation of nondominant carriers, including a proposal to "forbear" from requiring such carriers to file tariffs with the FCC. The FCC discussed at length the perverse effects and the harm to consumer welfare of imposing a tariff filing requirement upon carriers without market power. It explained that such requirement "is superfluous as a consumer protection device, since competition circumscribes the prices and practices of [nondominant] companies," *id.* at 479; that it slows the introduction of new and innovative services, *id.* at 471; and that it "stifles price competition." *Id.* at 479. The FCC recognized that "[f]orbearance discretion . . . must be exercised upon some well-defined bases which can be measured against the overall statutory goals and mandates of the Communications Act." *Id.* at 472. However, it tentatively concluded that the adverse consequences of tariff regulation applied to carriers without market power "frustrate the underlying purposes of the [Communications] Act," *id.* at 478, and that, accordingly, the exercise of forbearance discretion with respect to section 203 was fully justified. It further tentatively concluded upon analysis of section 203, and in particular, the modification powers granted under section 203(b)(2), that it

had "ample authority to remove the requirement of tariff filings where appropriate." *Id.* at 479.

In 1982, in the *Second Report and Order* issued in the *Competitive Carrier* proceeding, the FCC concluded that it had discretionary forbearance authority "when such forbearance furthers statutory purposes and the public interest." *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor*, 91 F.C.C.2d 59, 62 (1982) ("*Second Report and Order*"), *recons. denied*, 93 F.C.C.2d 54 (1983). It also found that its proposal to forbear from requiring nondominant carriers to file tariffs was appropriate. 91 F.C.C.2d at 65.

Proceeding in an incremental manner, the FCC determined in the *Second Report and Order* that only domestic resale carriers (*i.e.*, carriers that do not own facilities) would be eligible for permissive detariffing. Forbearance regulation, including permissive detariffing, was then extended to certain nondominant facilities-based carriers, such as Sprint and MCI, when the FCC issued *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 F.C.C.2d 554 (1983) ("*Fourth Report and Order*"). The FCC's decision was based upon the FCC's three years of experience with reviewing the tariffs of such carriers under streamlined regulation which revealed "no evidence that it is in the public interest . . . to continue receiving streamlined tariff . . . filings from [facilities-based nondominant carriers] to prevent them from charging unjust or unreasonable rates . . . ." *Id.* at 578. Thereafter in 1984, the FCC applied forbearance regulation to virtually all remaining nondominant carriers. *In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor*, ("*Fifth Report and Order*"), 98 F.C.C.2d 1191 (1984), *recons. denied*, 59 Rad. Reg. 2d (P & F) 543 (1985).[8]

[8] Subsequently, in the *Sixth Report and Order*, the FCC went further and required all nondominant carriers to cease filing

Neither AT&T nor any other party sought judicial review of the FCC's decisions in *Competitive Carrier* adopting and extending the policy of permissive detariffing. In fact, AT&T argued that the policy was lawful both before the FCC and in court. *See In re Policy and Rules Concerning Rates for Competitive Common Carrier Serv. and Facilities Authorizations Therefor*, 99 F.C.C.2d 1020, 1027 (1985) (*"Sixth Report and Order"*); *MCI Telecommunications Corp. v. FCC*, 799 F.2d 773 (D.C. Cir. 1986); Br. for Intervenor AT&T Information Systems Inc. at 41-42.

B. The MCI Complaint Proceeding

On August 7, 1989, despite AT&T's previously-held position favoring the lawfulness of permissive detariffing, AT&T filed an administrative complaint with the FCC against MCI. AT&T alleged that MCI was providing service to certain customers at rates and upon terms and conditions which were not set forth in MCI's tariffs and that MCI was, therefore, in violation of section 203. MCI admitted that it was providing non-tariffed service, but argued that under the FCC's permissive detariffing policy, it was allowed to provide service on a non-tariffed basis.

MCI moved to dismiss AT&T's complaint and AT&T moved for summary decision on the ground that MCI had admitted AT&T's principal allegation. In October 1991, after more than two years had elapsed without decision

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tariffs and remove those tariffs already on file. The decision was appealed by MCI to the Court of Appeals for the District of Columbia Circuit, which reversed the FCC's decision forbidding nondominant carriers from filing tariffs. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). However, the D.C. Circuit specifically noted that "in so ruling" it did "not reach the question whether the FCC's earlier permissive orders are invalid." *Id.* at 1196. Thus, the FCC's permissive detariffing policy continued to remain in effect, and most nondominant carriers, in reliance upon that policy, elected not to file tariffs.

by the FCC on AT&T's complaint, AT&T petitioned the D.C. Circuit for a writ of *mandamus* asking that the court direct the FCC to resolve the complaint. In response to the petition, the FCC announced that it would conclude its investigation by the end of January 1992, and the court thereafter dismissed AT&T's petition. *See American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 731 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); Pet. App. 43a.

On January 28, 1992, the FCC released its *Memorandum Opinion and Order* in the AT&T complaint proceeding. *AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C.R. 807 (1992); Pet. App. 57a-67a. The FCC denied that portion of AT&T's complaint that sought damages for MCI's "past conduct in offering service at rates and on terms and conditions not contained in tariffs filed with the Commission." 7 F.C.C.R. at 808; Pet. App. 63a. The FCC concluded that "MCI's conduct . . . complied with what the Commission in the *Fourth Report and Order* [in *Competitive Carrier*], has said MCI may do," 7 F.C.C.R. at 809; Pet. App. 63a, and that "[i]t would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability." 7 F.C.C.R. at 809; Pet. App. 64a.

C. The Rulemaking Proceeding

The FCC also dismissed that portion of AT&T's complaint that sought "prospective relief enjoining MCI from providing off-tariff services." *Id.* The FCC concluded that AT&T's complaint was, "in practical effect a challenge to the Commission's previously adopted and effective forbearance rule;" that such rule "has been in place for almost ten years" and "represents one of the cornerstones of our regulation of the long-distance industry;" that "[a]ny change in this fundamental policy would have a significant impact on a broad range of customers and

providers of telecommunications services across the nation;" and, that a general rulemaking in which "all interested parties will have an opportunity to comment," would permit the FCC to address permissive detariffing "as it applies to all nondominant carriers and to consider and implement any changes on an industry-wide basis. *Id.* at 809; Pet. App. 65a. The FCC, therefore, simultaneously instituted a rulemaking proceeding to consider the issue of permissive detariffing for nondominant carriers. *In re Tariff Filing Requirements for Interstate Common Carriers,* 7 F.C.C.R. 804 (1992).

On November 5, 1992, the FCC announced that it had adopted the *Rulemaking Order* at issue in this case and had concluded that its tariff forbearance rules are lawful and serve the public interest. On November 25, 1992, the FCC released the text of this *Order* and set forth a detailed analysis of the basis for its conclusion. The FCC found that although the language of section 203(a) states that "every" carrier "shall" file tariffs and the language of section 203(c) states that "no carrier . . . shall" provide service unless tariffs have been filed, the language of section 203(b)(2) "limits those commands." 7 F.C.C.R. at 8075; Pet. App. 13a. The FCC explained that under section 203(b)(2), it is granted the authority to modify any requirement of section 203 with the exception of expanding the 120-day tariff notice period set forth in section 203(b)(1). The FCC concluded that "this specific, narrow limitation on the Commission's modification power strongly suggests that Congress did not otherwise intend to limit our authority, upon a proper public interest showing, to alter the requirements of Section 203." 7 F.C.C.R. at 8075; Pet. App. 13a-14a.

Moreover, the FCC found that Congress had "acquiesced in the FCC's present forbearance rules." 7 F.C.C.R. at 8077; Pet. App. 22a. The FCC pointed out that "in its recent enactment of the TOCSIA [Telephone Operator Consumer Services Improvement Act of 1990, ch. 652,

Pub. L. No. 101-435, 104 Stat. 987, *as amended* Pub. L. No. 101-555, 104 Stat. 2760 (1990) codified in 47 U.S.C. § 226 (Supp. 1991)], Congress has demonstrated its awareness of the Commission's forbearance policy and made no attempt to disturb it." 7 F.C.C.R. at 8077; Pet. App. 23a. On the contrary, the FCC noted that Congress modified the FCC's authority "to forego requiring tariffs for a small subset of common carrier services" while leaving such authority for the remaining services offered by nondominant carriers "intact." 7 F.C.C.R. at 8078; Pet. App. 23a. Consequently, the tariffing requirement imposed by TOCSIA "would be mere surplusage if Congress believed that the FCC had incorrectly interpreted Section 203 as allowing permissive detariffing." 7 F.C.C.R. at 8078; Pet. App. 24a.

The FCC reaffirmed its *Competitive Carrier* finding that permissive detariffing "furthers the statutory purposes of the Communications Act." 7 F.C.C.R. at 8078; Pet. App. 26a. Specifically, the FCC explained:

> We also continue to believe that altering our forbearance policy would frustrate the overriding goals of the Act. We agree with those commenters that argue that the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers that provide services in a working market. We agree with those parties that assert that the forbearance policy developed in the *Competitive Carrier* decisions has played a major role in the rapid development of competition and in the consumer benefits that have resulted. Moreover, the record here confirms that but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered into the competitive fray at all.
>
> We conclude that permissive detariffing has proven to be a success over the years, as evidenced by the robust competition in the interexchange market and

the increased choices for customers with respect to carriers and prices. The decade of actual experience under permissive detariffing provides further confirmation of the success of that approach in furthering the statutory goals of the Communications Act. In 1982, approximately a dozen long distance carriers operated within the United States. By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers. Given this evidence, we believe it is clear that our permissive detariffing rules have allowed for new entrants into the interexchange market and have given consumers more flexibility with respect to the price of services, type of services, and selection of carriers. To adopt a different course of action at this time would only frustrate the success of our current policy.

7 F.C.C.R. 8079-8080 (footnotes omitted); Pet. App. 28a-30a.

D. The D.C. Circuit's Ruling In The MCI Complaint Proceeding

During the pendency of the rulemaking proceeding, AT&T petitioned the D.C. Circuit for review of the FCC's decision on AT&T's complaint against MCI. On November 13, 1992—eight days after the FCC had announced that it had adopted its *Rulemaking Order* but twelve days before the release of the text of that *Order*—the D.C. Circuit issued its decision on AT&T's petition for review in the MCI complaint proceeding. 978 F.2d 727. The court reversed and remanded the FCC's decision on AT&T's complaint in an opinion that was highly critical of the FCC's handling of that case. The court specifically noted the amount of time it had taken the FCC to reach its decision and the FCC's failure "to decide forthrightly the issue before it." *Id.* at 731; Pet. App. 43a. It found that the FCC had an obligation to decide the AT&T allegation that MCI was acting illegally in providing service on an off-tariff basis in the complaint

proceeding and that the FCC's decision instead to defer consideration of such issue to a rulemaking proceeding amounted to "a sort of administrative law shell game." 978 F.2d at 731-732; Pet. App. 44a.

Rather than confining itself to reviewing the FCC's decision on AT&T's complaint, the court went on to decide the lawfulness of the FCC's permissive detariffing policy, despite the fact that it did not have before it the FCC's most recent position as to the validity of its policy. The court did not take issue with the policy concerns expressed by the FCC in *Competitive Carrier*. It stated:

> We understand fully why the Commission wants the flexibility to apply the tariff provisions of the Communications Act to AT & T, which the Commission regards as the dominant carrier, differently from the way it applies the tariff provision to other competing carriers. We do not quarrel with the Commission's policy objectives. But the statute, as we have interpreted it, is not open to the Commission's construction.

978 F.2d at 736.

Thus, the court concluded that permissive detariffing "is simply not defensible" because section 203(a) requires that all carriers file tariffs. *Id.* at 735; Pet. App. 52a. Although the court conceded that the FCC's position "was not insubstantial when made initially," *id.*, it found that the court's reasoning in its decision in *MCI* v. *FCC* invalidating mandatory detariffing "forecloses the Commission's argument in this case." 978 F.2d at 736; Pet. App. 53a. The court also found (in a footnote) that its opinion was "somewhat buttressed" by this Court's decision in *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). 978 F.2d at 736, n.12; Pet. App. 53a-54a.

E. The D.C. Circuit's Summary Reversal Of The FCC's Rulemaking Decision Reaffirming Permissive Detariffing

AT&T petitioned the D.C. Circuit for review of the *Rulemaking Order*, and in light of that court's decision in *AT&T v. FCC*, moved for summary reversal. The D.C. Circuit granted AT&T's motion on the ground that its decision in *AT&T v. FCC* "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1988)." Pet. App. 2a.

This case is now before this Court on petitions for a writ of *certiorari* filed by the United States and the FCC, and by MCI.

SUMMARY OF THE ARGUMENT

The FCC's permissive detariffing policy is lawful under well-established principles of administrative law and statutory construction.

This Court has long recognized the important role that administrative agencies serve in permitting flexible implementation of regulatory statutes in dynamic circumstances. The telecommunications industry of the past two-and-one half decades illustrates graphically the sort of dynamic circumstances in which such flexibility is necessary. Faced with the previously unanticipated technological feasibility of competition in the long distance business, the FCC determined that competition would be good for telecommunications consumers and so adopted policies to encourage competition. This case arises from AT&T's efforts to frustrate the development of competition in a business that it formerly occupied to the exclusion of all others.

Congress gave the FCC the express power to modify the tariffing requirements of section 203 of the Communications Act. The FCC determined to exercise that

power in the permissive detariffing rule under review here on the basis of its finding that to do so would advance the policies mandated by Congress in the Act.

The Joint Respondents' very existence is attributable to the pro-competitive policies that the FCC began implementing in the 1970s. The dramatic expansion in consumer choice and the accompanying reductions in prices for long distance telephone service are ample proof that the FCC's pro-competitive policies fulfill the policy mandate of the Communications Act. Congress's recognition and tacit approval of those policies through the enactment of TOCSIA further confirms that those policies are consistent with the Act. In substituting its construction of section 203 for that of the FCC, the Court of Appeals is at odds with this Court's ruling in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and threatens to frustrate the pro-competitive and pro-consumer policies adopted by the FCC.

Standing virtually alone in its defense of the decision of the Court of Appeals, AT&T (the primary long-distance carrier found dominant and thus not subject to permissive detariffing) relies heavily on *Maislin*. That case, and the "filed rate" doctrine that it reaffirms, have little to do with the matters at issue here. The issue here is not whether a carrier may charge prices inconsistent with its filed rates but rather whether the FCC may permit carriers without market power not to file rates at all. The statutory policies and language of the Communications Act at issue here are fundamentally different from those of the Interstate Commerce Act at issue in *Maislin*.

For all of these reasons, this Court should reverse the decision of the Court of Appeals and hold that the FCC acted within its statutory authority in adopting its permissive detariffing policies and rules.

ARGUMENT

I. THE FCC CORRECTLY DETERMINED THAT THE COMMUNICATIONS ACT AUTHORIZES ADOPTION OF A POLICY OF PERMISSIVE DETARIFFING.

A. Both The Language And Legislative History Of The Communications Act Make It Clear That Permissive Detariffing Is Not Foreclosed To The Commission As A Reasonable Policy Alternative.

Permissive detariffing is centrally important to the FCC's efforts to regulate, consistently with the public interest, an increasingly competitive telecommunications marketplace. In the *Rulemaking Order* summarily struck down by the D.C. Circuit, the FCC found that "the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers that provide services in a working market;" that "the forbearance policy developed in the *Competitive Carrier* decisions has played a major role in the rapid development of competition and in the consumer benefits that have resulted;" and, that "the record here confirms that but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered into the competitive fray at all." 7 F.C.C.R. at 8079; Pet. App. 28a-29a. These findings are clearly matters of agency expertise and are basically unchallenged either by the Court of Appeals or by the parties to this proceeding.

On the contrary, in its decision in *AT&T v. FCC* that formed the underpinning of its summary reversal of the *Rulemaking Order* and which was otherwise quite critical of the FCC, the Court of Appeals sought to make clear that it did "not quarrel with the Commission's policy objectives." 978 F.2d at 736; Pet. App. 54a. Similarly, AT&T has conceded in a recent filing with the FCC that "direct economic regulation" for carriers such as "advance tariff review procedures and other constraints" unnecessarily "impedes the 'dynamism' of a competitive market and impose[s] both direct and indirect costs on users." Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, filed Sept. 22, 1993 in *Competitive Carrier*, at 16-17 (citing *In re Competition in the Interstate Interexchange Marketplace*, 6 F.C.C.R. 5880, 5895 (1991)).

The single issue in this case is whether the FCC was clearly barred from adopting permissive detariffing—no matter how important or sound—by the specific language of the Communications Act. For the reasons explained below, the Joint Respondents submit that the FCC's reading of the Communications Act as allowing it to adopt permissive detariffing was legally permissible and that such decision, therefore, should not have been summarily struck down by the D.C. Circuit.

It is, of course, well-settled that an agency's interpretation of its enabling statute must be accorded considerable deference. As this Court made clear in *Chevron:*

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 843.

A close reading of the applicable provisions of the Communications Act demonstrates that the certainty of legislative intent found by the Court of Appeals to forbid permissive detariffing simply does not exist.

Section 203(a) of the Act provides that "every common carrier . . . shall . . . file with the Commission . . .

schedules showing all charges . . . for interstate and foreign . . . communications . . . ." Section 203(b)(2) then gives the Commission the authority

> in its discretion and for good cause shown, [to] *modify* any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days. (*emphasis added*).

Thus, other than being prohibited from extending the 120-day notice period, the FCC is permitted by section 203(b)(2) to "modify any requirement" in section 203, including the tariffing requirements, in any way that can be deemed reasonable.

The D.C. Circuit determined, nevertheless, that the FCC's power to "modify" the tariffing requirements of section 203(a) was not sufficient to allow the agency to adopt a policy of permissive detariffing. The Court of Appeals, citing its earlier decision in *MCI v. FCC*, found "that the language of Section 203(b) 'suggest[s] circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement.'" 978 F.2d at 736; Pet. App. 53a.[9]

[9] The degree of any circumscription is obviously not specified in section 203(b)(2). It would seem clear as a matter of ordinary usage that "modify" has virtually the same (perhaps exactly the same) meaning as "change" or "alter." Although one definition for "modify" given in *Black's Law Dictionary* 905 (5th ed. 1979) is "to change in incidental or subordinate features," the primary definition is given simply as "to alter." Other synonyms for "modify" used in Black's—"enlarge, extend; amend; limit, reduce"—are equally unspecific. It would seem, therefore, that modifications, alterations, changes, etc., may be small or moderate, or may be severe, marked or dramatic. The word "modify" does not by itself either define or limit the seriousness of the modification.

Given this imprecision, it was plainly open for the FCC, under the test enunciated in *Chevron* to interpret its power to modify

Even assuming, *arguendo*, that the court's reading is correct, and that the term "modify" would not ordinarily warrant "wholesale abandonment or elimination of a requirement," it is obvious that the FCC's policy of permissive detariffing does not come close to eliminating tariff regulation under section 203 of the Act. The FCC only excused carriers without market power from the requirement to file certain (*viz.*, domestic) tariffs. Most long distance traffic (AT&T as a dominant carrier, still carries over 60 percent of this traffic), almost all interstate access traffic (*i.e.*, the access traffic carried by the Regional Bell Companies and other local telephone companies) and all international traffic is still carried, and is still required to be carried, pursuant to FCC tariffs. Certainly, in this sense, the FCC's permissive detariffing policy can reasonably be viewed as a modification, rather than as a "wholesale abandonment or elimination of a requirement." 978 F.2d at 736.

That the FCC may permit *some* traffic to be provided on a nontariff basis is shown by section 203(c)—which follows directly after section 203(b)(2)—and which states that:

> No carrier, *unless otherwise provided by or under authority of this* [*Act*], shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this [Act]. (*emphasis added*).

It would seem apparent that any ability to excuse carriers "under [the] authority" of the Communications Act must reside solely with the FCC. There is no entity other than the FCC itself which has been granted the power by Congress to administer the Communications Act or to determine, at least in the first instance, the rights and

under section 203(b)(2) as the power to change any tariff requirements therein to any extent so long as such change was reasonable and consistent with the purposes of its enabling statute. The FCC was not "circumscribed" to making only minor changes.

burdens of individual carriers thereunder. Consequently, any reading of section 203(b)(2) that denies the FCC any discretion to allow carriers to provide nontariffed service under any circumstances contradicts the proviso in section 203(c). That proviso plainly contemplates that an exception from the Act's tariff filing requirements will be granted, at least in some instances, and presumably, in the absence of any other logical possibility, will be granted by the FCC.[10]

The fact that Congress intended to grant the Commission broad flexibility in enforcing the tariff filing requirements of section 203(a) of the Act is also shown by the legislative history and passage of TOCSIA in 1990 and the concomitant amendment of the Communications Act in accordance with this legislation. The TOCSIA legislative history demonstrates that Congress was well aware of the Commission's long-standing policy of permissive detariffing for nondominant carriers and the dichotomy that the Commission had drawn between nondominant and dominant carriers for regulatory purposes.

Notwithstanding this knowledge, the concern of Congress about the Commission's policy of permissive detariffing was limited to the Commission's treatment of a particular class of nondominant common carriers—Operator Service Providers ("OSPs"). There had been many complaints about the high rates charged by OSPs and Congress sought to remedy the problems that had arisen by imposing new obligations upon OSPs through legislation. This legislation required, *inter alia*, that OSPs submit so-called "informational tariffs" which could be filed on the first day that the "changed rates, terms or conditions" contained in the "informational tariffs" became effective. *See* 47 U.S.C. § 226(h)(1)(A) (Supp. 1991).

[10] The unlimited modification power granted the FCC was examined and curtailed by Congress in 1976, but only in one respect—the FCC could not extend the notice period for filing tariffs beyond the notice period specified in section 203 (now 120 days).

In addition, the new legislation allowed the Commission to waive any requirements that the OSPs file "informational tariffs" after an initial period of four years following the date of the enactment of section 226. *See* 47 U.S.C. § 226(h)(1)(B) (Supp. 1991). In effect, the new legislation imposed tariffing requirements upon OSPs which overrode permissive detariffing, but only for a particular class of common carriers for which a problem had arisen. As the Commission stated in its *Rulemaking Order*, 7 F.C.C.R. at 8077-8078; Pet. App. 22a-25a, the tariffing requirements imposed on the OSPs under TOCSIA are not as stringent as the tariffing obligations imposed under section 203(a). Section 6 of the Report of the Senate Committee on Commerce, Science and Administration states that:

> While the FCC is charged with the responsibility for determining how detailed these informational tariffs [filed by the OSPs] must be, the Committee does not expect that these informational tariffs would require the same amount of supporting documentation as required of most dominant carriers. For instance, the Committee does not expect that the OSPs will be required to comply with all the requirements of Part 61 of the FCC's rules.[11]

S. REP. No. 439, 101st Cong., 2d Sess. (1990), *reprinted in* U.S.C.C.A.N. 1577, 1599.

[11] Part 61 of the FCC Rules, 47 C.F.R. Part 61 (1992), sets forth the procedural and substantive tariffing requirements established by the FCC. In the same Senate report, the Regulatory Impact Statement states that:

> This legislation requires all operator services companies to file "informational tariffs" with the FCC. The informational tariffs are necessary to allow the FCC to monitor the rates of OSPs and to determine whether competition in this market is benefiting the consumer. While this will increase the paperwork burdens faced by these companies and the FCC, these informational tariffs are not expected to contain the same detailed cost justification material that typically accompanies the tariffs filed by dominant carriers. S. REP. No. 439 at 1585.

Both the Senate Report and a House Report issued by the Committee on Energy and Commerce [12] make it clear that, other than treating problems associated with OSPs, Congress intended to make no change in the Commission's policy of voluntary forbearance. The House Report states, in particular, that it was not the intention of Congress in the new legislation "to change the filing requirements for dominant interstate interexchange carriers." H. R. REP. No. 213, 101st Cong., 1st Sess. 1, 14 (1989). This reference to dominant carriers shows that Congress was aware of the FCC's policy of differentiating between dominant and nondominant carriers for purposes of tariff filing requirements.

Apart from the implicit approval of the Commission's forbearance policy and its treatment of nondominant and dominant carriers, the TOCSIA legislation passed and contained in section 226 provides strong support for a reading of section 203 which is sufficiently flexible to allow the Commission to implement a policy of permissive detariffing. Under well-established principles of statutory construction, an act must be read as an integrated whole, but each section must also be read *in pari materia*, so that each section is independently given meaning.

The decision of the Court of Appeals that the FCC had no power to exempt nondominant carriers, including OSPs from the requirement to file tariffs under section 203, leaves sections 226(h)(1)(A) and 226(h)(1)(B) largely redundant. The obligations contained in those sections as applied to common carriers have already been covered by the more stringent requirements of section 203(a).[13] Accordingly, after the passage of the TOCSIA

[12] H.R. REP. No. 213, 101st Cong., 1st Sess. 1 (1989).

[13] AT&T argues that since section 226(a)(9) defines the term "provider of operator services" to mean not only "any common carrier" but also "any other person determined by the Commission to be providing operator services," sections 226(h)(1)(A) and (B) are needed to provide a requirement for "informational tariffs" for any "non-common carriers." However, sections 226(h)(1)(A) and (B) are not limited to non-common carriers. The sections are surplusage (under the court's reasoning) insofar as it covers common carriers and includes a requirement that common carriers file "informational tariffs." To fit sections 226(h)(1)(A) and (B) together with AT&T's reading of section 203, Congress would have had to limit that section so that it applied only to non-common-carrier OSPs.

legislation, sound statutory construction and the need to give meaning to sections 226(h)(1)(A) and (B) strongly suggest a reading of section 203 which is sufficiently flexible to accommodate the Commission's policy of permissive detariffing.[14]

In its opposition to *certiorari*, AT&T sought to minimize the importance of the TOCSIA legislation by citing the language in section 226(i), which states that:

> Nothing in this section [*i.e.*, the section containing the TOCSIA legislation] shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of [the Act].

AT&T claimed that this section showed that "TOCSIA cannot be read to alter the historic understanding" of the tariff filing requirements in section 203. AT&T's Br. in Opposition at 18. AT&T's argument is hardly persuasive. As shown, to the extent there was a "historic understanding" of the FCC's power to modify the re-

[14] As a matter of abstract logic it could be argued that sections 226(h)(1)(A) and (B) could be given meaning if it were assumed that Congress was seeking to exempt OSPs from the requirements of section 203(a) and impose lighter burdens on OSPs than any other dominant or nondominant carriers. The difficulty with such argument is that it is belied by the legislative history of TOCSIA. Even a rudimentary review of that legislative history makes it clear that Congress intended to add requirements for the regulation of OSPs to remedy the difficulties that had arisen in the provision of operator services.

quirements of section 203, it was that established by the FCC in *Competitive Carrier*. There, the agency set forth its position that it had the power to implement permissive detariffing; that interpretation stood for approximately eight years at the time TOCSIA was enacted. The statement in section 226(i) is therefore a further affirmation by Congress that it did not intend in TOCSIA to override existing FCC interpretations of other sections of the Communications Act including the FCC's interpretation of its power to modify the requirements of section 203.

B. The Decision Of The Court Of Appeals Is Not Supported By *Maislin*.

In *AT&T v. FCC*, the court stated that its finding that permissive detariffing was violative of the Communications Act is "somewhat buttressed" by this Court's 1990 decision in *Maislin*. However, as shown below, *Maislin* does not address the basic issues now before this Court in this case.

First, *Maislin* does not address the question of permissive detariffing. *Maislin* is basically an affirmation by this Court of a well-established regulatory policy: the "filed rate" doctrine. As this Court stated in *Maislin*:

> This case requires us to determine the validity of a policy recently adopted by the ICC that relieves a shipper of the obligation of paying the filed rate when the shipper and carrier have privately negotiated a lower rate. We hold that this policy is inconsistent with the [Interstate Commerce] Act.

497 U.S. at 119.

The FCC's policy of permissive detariffing does not involve, and is in no way at odds with, the "filed rate" doctrine. The "filed rate" doctrine is, by its terms, limited to a situation in which there is a "filed rate" and where the common carrier charges a shipper or other customer a rate which is different from that "filed rate."

Permissive detariffing involves a situation where an agency grants certain carriers (in this case nondominant carriers) the right to forbear from filing tariffs for certain services. When a carrier chooses under permissive detariffing not to file tariffs, it is axiomatic that there can be no inconsistency with the "filed rate" doctrine. Because there is no "filed rate" there can, by definition, be no divergence between a "filed rate" and the rate the carrier is actually charging. Thus, without a "filed rate" the comparison necessary for a violation of the "filed rate" doctrine simply does not exist.

There is nothing in the *Competitive Carrier* decisions which would allow a carrier to file tariffs and then ignore these tariffs in establishing non-tariffed rates for the same service. On the contrary, the problem of a carrier's rates which conflicted with its tariffs was recognized by the FCC in *Competitive Carrier*. Specifically, in the *Sixth Report and Order*, the FCC allowed a transition period during which carriers declared nondominant would be obligated to remove their tariffs currently on file with the FCC. The agency made it clear that to the extent tariffs remained on file during this period, the carriers whose rates were set forth in those tariffs "must provide . . . services consistent with the tariff until they chose to cancel those tariffs." 99 F.C.C.2d at 1034.[15]

In effect, the rule requiring carriers to adhere to their filed rates is necessary because it would otherwise make a mockery of the tariffing process, creating the opportunity for customer confusion if not deliberate deception, to allow carriers to file rates which may not be correct. But the rule does not speak to whether the filing must be made in the first place. It is no new phenomenon

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[15] As noted, this decision was reversed in other respects in *MCI v. FCC*. However, there was no challenge to the Commission's argument that carriers were not free under *Competitive Carrier* to violate the "filed rate" doctrine.

in the law to say that one is under no obligation to speak, but that if one does speak, it must be truthful.[16]

Second, *Maislin* involves the power of the Interstate Commerce Commission ("ICC") to excuse a carrier's admitted violation of the tariff filing requirements of the Interstate Commerce Act ("ICA"). There is no suggestion in *Maislin* that the ICC had explicit statutory power under the ICA to "modify" the tariff requirements in question.

Although the D.C. Circuit in *AT&T v. FCC* was correct in stating that ICC precedents are "often thought instructive in judicial construction" of the Communications Act, 978 F.2d at 736 n.12; Pet. App. 53a-54a, it is similarly well-established that any such comparison must be undertaken with considerable care. As the Second Circuit noted in *American Tel. & Tel. Co. v. FCC*, 503 F.2d 612, 616 (2d Cir. 1974), "in drafting the Communications Act of 1934 . . . the congressional intent was not to provide a carbon copy of the Interstate Commerce Act." *See also General Tel. Co. v. United States*, 449 F.2d 846, 856 (5th Cir. 1971) ("the functions of the Interstate Commerce Commission . . . are of an entirely different nature than those of the Federal Communications Commission" and "[t]hus we are unwilling to restrict the Federal Communications Commission to a course of action which has been dictated by the requirements of the transportation industry"); *Sea-Land Serv. Inc. v. ICC*, 738 F.2d 1311, 1318 n.11 (D.C. Cir. 1984) (precedents arising under the ICA may be useful to issues before the FCC "by way of analogy only").

In 1978, Congress restructured the ICC's tariff authority in sections 10761 and 10762. At this point, Congress could have modeled the ICC's modification powers on

[16] It is ironic to note that the other principal basis for the "filed rate" doctrine is the need to preserve "the agency's primary jurisdiction over reasonableness of rates . . . ." *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981) (citations omitted). Here, the FCC has determined that reasonable rates are best assured by eliminating tariffs for nondominant carriers, and yet that determination has been usurped by the court below.

section 203(b)(2). However, Congress chose not to equalize the statutory modification powers of the two agencies and left the ICC with far less power to modify tariff requirements than was granted the FCC. For example, section 10762(d)(1) of the ICA does not give the ICC authority to modify its tariff provisions by "general order" and, unlike section 203(b)(2), may best be considered—as it was by the D.C. Circuit in *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 397 (D.C. Cir. 1986) (*"RCCC"*)[17]—as a provision allowing the ICC to grant "waivers" in appropriate situations.

[17] The differences between the Communications Act and the ICA are shown by the D.C. Circuit's decision in *RCCC*. There is no section in the ICA which is directly comparable to section 203(b)(2) of the Communications Act. The ICC has no power to modify the ICA's tariff filing requirement through the issuance of a "general order", as does the FCC pursuant to section 203(b)(2) of the Communications Act. Rather, 49 U.S.C. § 10762(a)(1) only allows the ICC, in appropriate circumstances, to waive the general tariff filing requirement in 49 U.S.C. § 10762(a) (analogous to section 203(a) of the Communications Act). Moreover, the ICC has no power to waive the prohibition on rebate provision, 49 U.S.C. § 10761(a) (analogous to section 203 of the Communications Act). In *RCCC*, the court determined that the ICC's action "goes beyond 'chang[ing] the . . . requirements of this section,' and nullifies other sections of the [Interstate Commerce] Act for which no waiver authority exists." 793 F.2d at 379. Specifically, the court found that the ICC's action was outside the parameters of its waiver authority in 49 U.S.C. § 10762(d)(1) because, to find otherwise, would also nullify another section of the Act—49 U.S.C. § 10761(a)—"for which no waiver authority exists."

Because the FCC can modify both 203(a) and 203(c), there is no danger that the Commission here is nullifying another section of the Act over which it has no authority. Consequently, both in terms of its modification authority and the fact that such modification authority covers both 203(a) and 203(c), the Communications Act is substantially different from the statute that the Court of Appeals construed in *RCCC*. The Second Circuit recognized that the FCC had been granted more comprehensive modification authority than possessed by the ICC under the ICA in *American Tel. & Tel. v. FCC*, 503 F.2d 612, 617 (2nd Cir. 1974), stating that AT&T's position that section 203(b) confers no greater power than that granted the ICC under the ICA "is simply not so."

Thus, although comparisons between the Communications Act and the ICA are relevant here, it is the difference between section 203(b)(2) and the lesser modification authority granted the ICC under the ICA which is most "instructive." It is difficult to understand why Congress would have deliberately granted the FCC far more sweeping modification powers than the ICC unless Congress intended the FCC to be able to use those powers in a reasonable manner consistent with its statutory responsibilities.

Finally, it is not dispositive in this case that *Maislin* recognizes that tariffs are extremely important. This recognition hardly breaks new ground. Rather, it simply reaffirms and emphasizes long-established regulatory principles that were known to the FCC at the time of *Competitive Carrier*.

There has never been any dispute as to the general importance of tariffs, and *Competitive Carrier* is not inconsistent with this view. The FCC's decision in *Competitive Carrier* is based on the assumption—soundly grounded in economic learning and basically unchallenged in the proceedings below—that nondominant carriers, because of their lack of market power, could not, or were at least highly unlikely to, engage in the unjust, unreasonable, or unduly discriminatory pricing activities forbidden under Title II of the Communications Act. In essence, the Commission weighed the dangers of any diminution of enforcement ability as a result of voluntary forbearance against the substantial harm that would follow as a consequence of mandating that all nondominant carriers file tariffs. The FCC did not relieve dominant carriers, whose market power would give them the ability and incentive to violate sections 201(b) and 202(a) of the Communications Act, of the obligation to file tariffs and such obligation has been maintained to the present time. *Maislin* says nothing about the correctness of the balance drawn by the FCC in *Competitive Carrier* and does not determine the authority of the FCC under the Communications Act to apply such a balance under section 203 consistent with the modification powers granted to it in section 203(b)(2).

For all these reasons, the Joint Respondents respectfully suggest that *Maislin* provides no real support for the decision of the Court of Appeals in *AT&T v. FCC*—the decision relied upon by the D.C. Circuit in this case to reverse summarily the *Rulemaking Order* at issue.

CONCLUSION

The Joint Respondents respectfully submit that the order of the Court of Appeals should be reversed and the FCC's *Rulemaking Order* affirmed and reinstated.

Respectfully submitted,

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QUESTION PRESENTED

Whether the FCC's authority to "modify any requirement" of Section 203 of the Communications Act in "special circumstances or conditions" allows the FCC to exempt all carriers deemed to lack market power from statutory filed rate requirements that this Court has found are "utterly central" to the administration of the Act and rest on Congressional determination that maximum publicity of carrier rates is necessary to prevent discrimination, irrespective of the degree of competition?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NOS. 93-356, 93-521

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

BRIEF FOR RESPONDENT AT&T

Respondent American Telephone and Telegraph Company ("AT&T")[1] submits this Brief in support of the decision below.

RELEVANT STATUTES

The provisions of Sections 201, 202, 203, 204, 205, 210, 211, 226, and 332 of the Communications Act of 1934, 47 U.S.C. §§ 201-05, 210-11, 226, 332; of Section 6 of the Interstate Commerce Act as it stood in 1934, 24 Stat. 380 (1887), as amended; and of the current versions of that section (49 U.S.C. §§ 10761, 10762) are reprinted in the statutory appendix to this brief.

STATEMENT OF THE CASE

This case presents another question under the statutory filed rate doctrine that applies to the Interstate Commerce Act and

[1]The statement required by Rule 29.1 appears at p. ii of AT&T's Brief in Opposition to the petitions for certiorari ("Cert. Opp.").

statutes modelled on it. In *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), this Court held that the Interstate Commerce Commission ("ICC") could not use the broad statutory proscription against "unreasonable practices" to prevent a fraud when the agency action had the effect of authorizing carriers to charge, and customers to pay, unfiled rates. Notwithstanding the motor carriers' conceded lack of market power in *Maislin*, the Court concluded that the ICC's policy would both nullify the core provision of the Interstate Commerce Act and authorize the unequal rates that the Act was designed to prevent.

In this case, the Federal Communications Commission ("FCC") has asserted far broader, potentially unlimited, authority to exempt communications common carriers from the rate filing provisions of the Communications Act of 1934. In orders entered in 1992, the FCC purports to exempt all common carriers that have not been found to possess market power both from the statutory requirement that they "shall" file "all" their rates (47 U.S.C. § 203(a)) and from the statutory ban on charging select customers secret negotiated rates that are lower than the filed rates (*id*. § 203(c)). The FCC claims that its Section 203(b)(2) authority to "modify any requirement of this section in particular instances or by general order applicable to special circumstances or conditions" means that the FCC can exempt all carriers found to lack market power from all requirements of Section 203.

This issue arises in an unusual posture. During the first 49 years of the Communications Act, the FCC explicitly recognized that it had no authority to exempt carriers lacking market power from the core rate filing requirements of Section 203. Further, when the FCC first changed its position in the early 1980's, petitioner MCI argued, and the D.C. Circuit held, that the FCC lacked authority to revoke rate filing requirements for any carrier. *See MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (Cert. Opp. 1a). The FCC initially purported to acquiesce in that decision. However, after MCI thereafter itself began to provide selected large customers with secret unfiled discounts off its tariffed rates, the FCC entered orders in 1992 that sought

to authorize MCI to do so. In the decisions at issue here, the D.C. Circuit vacated those 1992 orders on the authority of its 1985 decision.

1. The Communications Act of 1934 and the FCC's Pre-1983 Positions. In Title II of the Communications Act of 1934, Congress established a comprehensive scheme to govern the provision of interstate communications services by telephone and telegraph common carriers. With exceptions not here relevant, these provisions were modelled on—and copied almost verbatim from—the provisions of the Interstate Commerce Act that then applied to railroads and that were extended to truckers in 1935.

Section 201 of the Communications Act requires that every common carrier provide service on reasonable request, and requires that all charges, classifications, practices, and regulations be just and reasonable. 47 U.S.C. § 201. Section 202 of the Act prohibits "unjust or unreasonable discrimination" in the charges, practices, classifications, or regulations for "like" communications services, and further makes it unlawful for any carrier to extend any preference or advantage to any person, class of persons, or locality. *Id*. § 202(a).

Section 203 contains what will be referred to in this Brief as "filed rate requirements." Section 203(a) provides that "[e]very common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges." *Id*. § 203(a). Section 203(c) correlatively provides that "no carrier, unless otherwise provided by or under authority of this chapter," shall provide services to any customer unless rate schedules are on file, and that no carrier shall charge a rate lower than or different from the charges specified in that schedule. *Id*. § 203(c).

Other provisions of the Act allow private, or public, challenges to the lawfulness of rates. Section 204 establishes a procedure for the FCC, "upon complaint" by a third party or on "its own initiative," to investigate the lawfulness of, and suspend, "any new or revised" tariff filing. *Id*. § 204. Section 205 authorizes the

FCC to determine that the charges set forth in the filed tariffs are not "just and reasonable," to prescribe the precise "just and reasonable charges to be hereafter observed," and to bar the carrier from thereafter publishing or collecting different rates. *Id.* § 205. Sections 206-209 establish a complaint process through which parties that learn of violations of the Act that cause them injury may seek redress from the FCC or federal courts. *See id.* §§ 206-209.

Other sections of the Act provide for penalties on carriers, or customers, for violations of these provisions (*see, e.g., id.* § 503) or authorize exemptions from the rate filing requirements for particular classes of carriers (*see, e.g., id.* § 332).

Prior to the early 1980's, the FCC consistently took the position that it had no authority to excuse any carrier from the filed rate requirements of Section 203. It held that it had no authority to permit one facilities-based long distance carrier with no market power (Western Union) not to file all its rates or to provide service at unfiled rates:

> There can be no question that tariffs are essential to the entire administrative scheme of the Act. They serve as a kind of "tripwire" enabling the Commission to monitor the activities of carriers subject to its jurisdiction and to thereby insure that the charges, practices, classifications, and regulations of those carriers are just, reasonable, and nondiscriminatory within the meaning of Sections 201 and 202 of the Act. The importance of tariffs and the requirement that common carriers—*all common carriers—must offer all of their communications services to the public through published tariffs* is well established. *See Armour Packing Company* v. *United States*, 209 U.S. 56 (1908).

Western Union Telegraph Co., 75 F.C.C.2d 461, 474 (1980) (emphasis added). The FCC similarly took the position that it had no authority to eliminate these requirements even for long distance carriers that do not own any facilities, but merely resell services of others:

> *The Commission has affirmative commands from Congress to ensure* that rates are just, reasonable and nondiscriminatory, Sections 201, 202; *that rates and practices are set forth in tariffs filed with the FCC, Section 203*; and that carriers obtain certificates of public convenience and necessity before obtaining facilities and putting them in operation, Section 214. [¶] *The agency has no authority to ignore these commands, even if market forces arguably are present which undercut the "natural monopoly" justification for regulation.*

AT&T v. *FCC*, 572 F.2d 17 (2d Cir. 1978), Brief of FCC, pp. 49-50 (emphasis added).

2. The *Competitive Carrier* Rulemaking. In 1979, the FCC instituted a rulemaking—known as *Competitive Carrier*[2]—to determine how it should exercise its regulatory authority over various categories of long distance carriers. In the initial stages of this rulemaking, the FCC concluded that it could reduce or eliminate its economic regulation of "nondominant carriers"—*i.e.*, carriers lacking market power. It therefore "streamline[d]" the rate filings of such carriers by allowing them to make their filings without cost support, on short notice, and in simplified formats.[3]

In the next stages, however, the FCC went beyond simply withdrawing from direct economic regulation. It adopted a policy under which it would "forbear" from itself requiring certain carriers to file their rates at all.[4] In adopting this policy, the FCC acknowledged that Section 203's filed rate requirement was "a means for this Commission to ensure the Act's objective of reasonable and not unjustly discriminatory rates."[5] However, the FCC stated that, in the case of carriers lacking market power, market forces should generally assure that rates are neither excessive nor unduly discriminatory and that the "fundamental

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[2]*See Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor* ("*Competitive Carrier*"), CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308 (1979).

[3]*See Competitive Carrier*, First Report and Order, 85 F.C.C.2d 1, 33-37 (1980).

[4]*Competitive Carrier*, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, 447 (1981) (proposing forbearance policy); *id.*, Second Report and Order, 91 F.C.C.2d 59, 65-67, 73-74 (1982) ("*Second Report*").

[5]*Second Report*, 91 F.C.C.2d at 71.

goals" of the Act would be better served by relieving carriers of their rate filing duties and relying on "carrier and customer complaints" to assure compliance with Sections 201(b) and 202(a). *Second Report*, 91 F.C.C.2d at 69-71. The forbearance policy was extended to virtually all long distance carriers except AT&T in the *Fourth Report* in this docket, 95 F.C.C.2d 554, 578-79 (1983).

No party appealed the *Second* or *Fourth Reports*. They neither imposed any obligation on any carrier nor restricted the rights of any person to pursue legal remedies if any carrier in fact failed to file all its rates. As the D.C. Circuit stated, nearly all carriers continued to file all their rates after the *Second* and *Fourth Reports* were issued. *MCI* v. *FCC*, 765 F.2d at 1189 (Cert. Opp. 5a).

However, in its *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), the FCC made detariffing mandatory for non-dominant carriers and prohibited them from filing tariffs. MCI petitioned for review of the *Sixth Report* in the Court of Appeals for the D.C. Circuit. Contrary to its representations here (*see* MCI Br. 9 n.13), MCI did not oppose the *Sixth Report* as "inconsistent with the flexibility the FCC's permissive detariffing rules were intended to promote."[6] MCI argued that both mandatory and permissive detariffing are unlawful for the same reason: "the only legal rates are those filed with the agency and . . . such filed rates must be used by carriers to conduct their business to the exclusion of unpublished customer-carrier contracts." *MCI* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985), Brief of MCI, p. 10 (Apr. 1, 1985).[7] Indeed, MCI stated that, "[b]ecause the legal obligation to file tariffs is imposed directly upon the carrier pursuant to Section 203," even after the *Fourth Report* it had "no legal alternative" but to continue to file its rates, and the *Fourth Report* was a statement of the FCC's enforcement policies that had no effect on that obligation. *Id.*, p. 8.

[6]Indeed, in its brief in *AT&T* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992), MCI acknowledged that it had "argu[ed] not only against the mandatory detariffing required by the [*Sixth Report*] but also against the Commission's authority to allow permissive tariffing." *Id.*, Brief of MCI, p. 4 & n.9 (July 17, 1992).

[7]Ten copies of this brief have been lodged with the Clerk of the Court.

MCI's argument in that case directly contradicts its contentions here. MCI explained that Congress's "great purpose" in enacting both "the Interstate Commerce Act and the Communications Act" was "the prevention of unjust discrimination" and that "the carefully selected means by which this goal was to be obtained was the requirement that all common carriers have uniform schedules of rates and that those rates be posted and filed." *Id.*, pp. 23-24. MCI argued that a "clearer frustration of express Congressional purpose [than detariffing] is hard to imagine," because "[o]nly when tariffs are on file can members of the public . . . tell whether they . . . are being charged a carrier's uniform rate and, if not, can spot the preferential treatment they are entitled to complain about." *Id.*, pp. 24, 26-27. MCI also argued that detariffing would render meaningless the other provisions of Title II prohibiting rebates and granting the FCC the power to suspend filed rates. *Id.*, pp. 32-39.

3. The D.C. Circuit's Decision in *MCI* v. *FCC* and the FCC's Apparent Acquiescence. The D.C. Circuit agreed. It held that Section 203's requirements that "every" common carrier "shall" file "all" its rates (47 U.S.C. § 203(a)) and that "no" common carrier "shall" charge any rates other than those filed (*id.* § 203(c)) impose mandatory obligations on common carriers that the agency has no power to waive. *MCI* v. *FCC*, 765 F.2d at 1191-96 (Cert. Opp. 10a-20a). The court rejected the FCC's assertion that the FCC's Section 203(b)(2) power to "modify any requirement" of Section 203 in "particular instances" or "special circumstances" permitted it to "exempt" carriers from the statutory filed rate requirements or to "remove[ ] [these requirements] in gross by agency order." *MCI* v. *FCC*, 765 F.2d at 1191-93 (Cert. Opp. 10a-14a). The court stated that the FCC's view not only "depart[ed] from any plausible reading of the statute's text," but also was inconsistent with decisions of both the Court of Appeals for the Second Circuit and, until recently, the FCC itself. *See id.* at 1192-93 (Cert. Opp. 11a-14a).

Finally, the court stated that, in light of its interpretation of Section 203, the permissive detariffing policy of the FCC's *Fourth Report* could continue to stand, if at all, only as an exercise of

the agency's enforcement discretion rather than as a rule that purported to exempt any carriers from the statutory rate filing obligation. *MCI* v. *FCC*, 765 F.2d at 1190-91 n.4 (Cert. Opp. 8a-9a n.4). The FCC appeared to acquiesce in this ruling. In a brief filed in the D.C. Circuit later that same year, the FCC defended the lawfulness of its permissive detariffing policy on the ground that it was not a substantive rule that changed any "unalterable" tariff obligations, but merely a decision not to "enforce the tariff filing requirement of Section 203," and the FCC compared that decision to "a prosecutor's decision not to indict." *MCI* v. *FCC*, No. 84-1402 (D.C. Cir.), Brief of FCC, pp. 26-27 & n.42 (Dec. 26, 1985).

AT&T then took the same position.[8] Similarly, contrary to MCI's misstatements, AT&T has maintained throughout the period since *MCI* v. *FCC* was decided that rate filing requirements cannot be removed for any carrier (including AT&T), but that the FCC can, and should, streamline regulation of all long distance carriers.[9] In this regard, AT&T has argued that a policy of asymmetrical rate filing and other regulations for carriers in the

[8]Contrary to the misstatements of the FCC (Br. 7) and MCI (Br. 10-11), AT&T defended the FCC order on the same ground, stating that the FCC's forbearance policy "merely indicated that the Commission would not take enforcement action." *Id*., Brief of AT&T, p. 41 (Jan. 9, 1986).

[9]*See, e.g., Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Reply Comments of AT&T, pp. 63-70, 81-82 (Sept. 18, 1990) (Section 203 requires AT&T and all interexchange carriers to file all rates; Section 203(b) permits the FCC to adopt shortened notice periods, to allow "contract tariffs" rather than traditional rate schedules, and to eliminate requirements of cost support, for all carriers in competitive markets). Similarly, in the 1985 Congressional testimony that MCI miscites (Br. 11), AT&T was discussing elimination of cost of service price regulation, not rate filings.

Finally, contrary to MCI's misstatement (Br. 16), AT&T's September 22, 1993 request to the FCC that it be reclassified as a "nondominant" carrier was *not* a request that it be excused from filing tariffs. AT&T made its request after the D.C. Circuit had invalidated permissive detariffing and had held that AT&T and other carriers must file tariffs, regardless of whether they are classified as "dominant" or "nondominant." AT&T's lack of market power does mean that, *so long as rates are filed and customers can determine all of the carrier's charges*, the purposes of Sections 201(b) and 202(a) can be met without price cap regulations and lengthy notice periods for rate filings.

competitive long distance services market is an economically unsound policy as well as unlawful.

4. The FCC's 1992 Orders and the Decisions Under Review. Notwithstanding its statements and successful arguments in 1985, MCI began in mid-1987 to violate Section 203 by providing services to its largest customers under secret, unfiled discounts off its tariffed rates. When it learned of this practice, AT&T filed a complaint with the FCC under Section 208 of the Communications Act, 47 U.S.C. § 208, challenging MCI's violation of its statutory obligations.

AT&T alleged that MCI was, for example, providing service to Merrill Lynch at rates at least 8.5% lower than the lowest rates specified in its tariffs, and to a large university under an unfiled contract that expressly stated that its "pricing will be based on a 5% discount applied to . . . the interstate tariff on file with the Federal Communications Commission." *AT&T* v. *MCI*, FCC File No. E-89-297, AT&T Complaint (filed Aug. 7, 1989). MCI admitted the factual allegations of AT&T's complaint, and defended its conduct as authorized by the *Fourth Report*.

The FCC dismissed AT&T's complaint by applying the "rule" of its *Fourth Report*. Contrary to its previous position that the permissive detariffing policy of the *Fourth Report* was simply an exercise of its enforcement discretion, the FCC stated that this policy was actually "a binding substantive rule" that had "removed" Section 203's rate filing requirement in the case of nondominant carriers. *AT&T Communications* v. *MCI Telecommunications Corp.*, 7 FCC Rcd. 807, 809 (1992).

The D.C. Circuit reversed. *AT&T* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992) (MCI Pet. 37a). Relying on *MCI* v. *FCC* and *Maislin*, the Court held that the FCC's forbearance rule was "plainly contrary to Section 203." *Id*. at 729 (MCI Pet. 39a). It concluded that "[w]hether detariffing is made mandatory, as in the *Sixth Report*, or simply permissive, as in the *Fourth Report*, carriers are, in either event, relieved of the obligation to file tariffs" and that "that step exceeds the limited authority granted the [FCC] in

Section 203(b) to 'modify' requirements of the Act" in special circumstances or conditions. *Id.* at 736 (MCI Pet. 53a).

During the pendency of that petition for review, the FCC conducted a new rulemaking to reexamine the lawfulness of its forbearance policy. In its Order in that proceeding, which was released shortly after the decision in *AT&T* v. *FCC*, the FCC reiterated its position that Section 203(b)(2) granted it authority to remove the statutory "tariff filing requirements of both subsections (a) and (c) of Section 203." MCI Pet. 14a. The FCC also concluded that Congress had "acquiesced" in this interpretation by failing to enact legislation disapproving it (*id.* at 22a-25a), and it made a series of "findings" that its permissive detariffing rule has benefited competition in the long distance market—all of which AT&T disputes.[10]

The FCC's exemption from Section 203 applies to all carriers not previously declared to have market power and thus to be dominant. This category includes not only virtually all interexchange carriers other than AT&T but also the emerging

[10]The FCC's findings do not withstand even cursory analysis. For example, the FCC's attempt to attribute the dramatic post-January 1, 1984 reduction in AT&T's long distance market share, and the flood of long distance entry, to the permissive detariffing rules is preposterous (MCI Pet. 29a-30a); these are products of AT&T's January 1, 1984 divestiture of the Bell Operating Companies, which assured that all long distance carriers enjoyed the same access to local bottleneck facilities that AT&T alone had formerly enjoyed. The suggestion that tariff regulation requires costly, economic regulation of carriers is meritless (*id.* at 27a); rate filing can be the equivalent of little more than postcards (*see* p. 24 n.33, *infra*). Similarly, the suggestion that these rules have been fashioned to prevent "price signalling" and exchange of price information in the competitive long distance market defies analysis (MCI Pet. 27a) in that AT&T is required to file tariffs, and that MCI, Sprint, and other long distance carriers are permitted to do so. AT&T has demonstrated at length in other contexts that the asymmetrical imposition of rate filing requirements in the competitive long distance market creates the worst of all worlds. Indeed, as the D.C. Circuit has found, the asymmetry allows AT&T's competitors to match AT&T's prices, but not vice versa, and has enabled MCI, Sprint, and others to abuse the regulatory process to harm competition by challenging each of AT&T's competitive tariffs. *MCI Telecommunications Corp.* v. *FCC*, 917 F.2d 30, 35 & n.2 (D.C. Cir. 1990); *see Regular Common Carrier Conf.* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986).

competitive access providers ("CAPs") that compete with local exchange carriers (such as the Bell Operating Companies) in providing the interstate "access" services that long distance carriers use to connect their networks to homes and businesses.

On June 4, 1993, the D.C. Circuit granted AT&T's motion for summary reversal of the FCC's decision. Without addressing the asserted "policy" benefits of "permissive detariffing," the D.C. Circuit held that "[t]he decision of this court in *American Tel. & Tel. Co.* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992) conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." MCI Pet. 2a. MCI and the FCC petitioned for certiorari, and on November 29, 1993, this Court granted the petitions and ordered them consolidated. 114 S. Ct. 543.[11]

SUMMARY OF ARGUMENT

The D.C. Circuit's decision is correct for three reasons. First, the terms of the Communications Act are not susceptible to an interpretation in which the FCC can use its authority under Section 203(b)(2) to exempt any carrier from the core requirements that each file all its rates (Section 203(a)) and that each charge only filed rates (Section 203(c)).

Section 203(b)(2) allows "modif[ications]" of Section 203's requirements—*i.e.*, changes in the time, form, content, or place of required rate filings—not exemptions. Further, the terms of Section 203(c) indicate that exemptions from rate filing requirements can arise only from other provisions of the "chapter" (*e.g.*, Sec-

[11]After the D.C. Circuit vacated its permissive detariffing policy, the FCC issued yet another rulemaking decision on the subject. In this decision, it held that nondominant carriers, although required to file tariffs under the Court of Appeals' decisions, need not specify their rates in their tariffs. Instead, the FCC concluded it would be sufficient if such carriers filed ranges within which their rates would fall. *Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd. 6752, 6759 (1993). AT&T petitioned for review of that decision, and the D.C. Circuit has ordered expedited briefing and argument (Consol. No. 93-1562).

tion 332's authorization of exemptions for mobile carriers). In all events, the FCC's interpretation of Section 203(b)(2) is foreclosed by the numerous other provisions of the Act which presuppose that rates are filed and which the FCC has no authority to modify. In this regard, the provision of the Interstate Commerce Act (Section 6(3)) on which Section 203(b)(2) was based has uniformly been construed for over eighty years to reject the FCC's current claim.

Second, the FCC's interpretation of Section 203(b)(2) would have to be rejected even if the language of the Act were ambiguous. The century of decisions of this Court that culminated in the 1990 decision in *Maislin* establishes that the statutory rate publication requirements—and the ban on secret rates—are the fundamental means of achieving the statutory purposes of equal and reasonable rates, whatever the extent of competition. This Court has thus consistently held that even facially applicable provisions of the law cannot be construed to authorize exemptions from these requirements unless Congress has explicitly so provided—as it did in Section 332 of the Act for one category of carriers and as it has done in other statutes as well.

Third, petitioners' own arguments establish that Congress has ratified the D.C. Circuit's interpretation of Section 203(b)(2). Petitioners seek to distinguish *Maislin* on the ground that Congress amended the Interstate Commerce Act to allow the ICC to exempt one category of carriers (motor *contract* carriers) from filed rate requirements, thus " 'demonstrating that Congress is aware of the requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers.' " Fed. Br. 29 (quoting *Maislin*, 497 U.S. at 135). That is no distinction. The situation here is identical. Congress responded to the D.C. Circuit decision in this case by refusing to adopt the broader amendments to the Communications Act that petitioners and their *amici* urged and by instead authorizing an exemption from filed rate requirements for only a narrow class of mobile radio carriers, again "demonstrating that Congress is aware of the requirement [in the Communications Act] and has deliberately chosen not to disturb it with respect to [any other] common carriers." *Id*.

ARGUMENT

Introduction

The FCC's Order would establish a broad, potentially unlimited, exemption from the statutory requirement that each common carrier file "all" its rates (47 U.S.C. § 203(a)) and charge only those rates that it has filed (*id*. § 203(c)). Today, the FCC's Order would remove these "filed rate" requirements for the domestic services offered by virtually all the nation's nearly 500 interexchange carriers (save AT&T). Further, by its terms, the Order would require removal of the requirements for AT&T's long distance services once the FCC finds (as AT&T contends) that AT&T too now lacks market power. Finally, the Order would also require removal of the filing requirements for the interstate access services of all local exchange carriers if and when these markets are deemed competitive (as the Bell Operating Companies contend that they already are or soon will be).

The D.C. Circuit correctly held that the FCC has no authority to effect these exemptions. This holding is compelled by the terms, structure, and purposes of the Communications Act. It is further compelled by a century of decisions of this Court that construed rate filing provisions modelled on the original Interstate Commerce Act ("ICA") and that establish a "filed rate doctrine" that "has been extended across the spectrum of regulated utilities." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981).

These cases are especially pertinent. The terms of Section 203(a),[12]

[12]*Compare* 47 U.S.C. § 203(a) ("Every common carrier . . . shall . . . file with the Commission and print and keep open to public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges") *with* 49 U.S.C. App. § 6(1) ("Every common carrier . . . shall file with the Commission . . . and print and keep open to public inspection schedules showing all the rates, fares, and charges . . . and the classification of freight . . . and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges").

(b),[13] and (c)[14] of the Communications Act of 1934—and, indeed, of virtually all the rest of Title II[15]—were copied almost verbatim from the then-existing provisions of the Interstate Commerce Act, with rare exceptions not here relevant.[16] Congress explicitly overruled the prior ICC decision that did not require telephone and telegraph carriers to file all their rates (*Unrepeated Message Case*, 44 I.C.C. 670, 674 (1917)), and adopted the same rate filing duties that Section 6 of the Interstate Commerce Act then imposed on railroads.[17] In this regard, the House and Senate Reports on the Bill confirmed that these provisions of the Communications Act were designed to achieve the same objective as the cognate provisions of the ICA.[18] The Reports fur-

[13]*Compare* 47 U.S.C. § 203(b) *with* 49 U.S.C. App. § 6(3) (quoted at p. 26, *infra*, and at Stat. App. 24a).

[14]*Compare* 47 U.S.C. § 203(c) *with* 49 U.S.C. App. § 6(7) (quoted at Stat. App. 25a).

[15]*Compare, e.g.*, 47 U.S.C. §§ 201(b), 202(a), 204, 205, 206, 207, 208, 209, 210 *with* 49 U.S.C. App. §§ 1(5) & 1(6), 2 & 3(1), 15(7), 15(1), 8, 9, 13(1) & 13(2), 16(1), 1(7). Ironically, two of MCI's former counsel (one of whom was a long-time member of MCI's Board of Directors) have demonstrated these points in detail. *See* Kenneth A. Cox & William J. Byrnes, *Title II: The Common Carrier Provisions—A Product of Evolutionary Development*, in *A Legislative History of the Communications Act of 1934*, pp. 25-60 (Max D. Paglin ed. 1989) ("*Paglin's Legislative History*") (summarizing the evolution of the ICA from 1887 to 1934 and the 73d Congress's use of the ICA as the basis for Title II).

[16]The one explicit exception is Section 221(b) of the Communications Act, which together with Section 2(b), 47 U.S.C. § 152(b), was written to deny the FCC the same ability to exercise jurisdiction over purely intrastate services that the courts had found the ICC to possess. *See Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 372-73 (1986).

[17]*See* 77 Cong. Rec. 10313 (1934) (statement of Rep. Sam Rayburn) ("Section 203, regarding the filing of schedules of charges, is based upon section 6 of the Interstate Commerce Act, which relates only to transportation. It is clear that the commission must have information as to charges made by the carriers if it is to regulate rates"); *see also* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934); 77 Cong. Rec. 8323 (1934) (statement of Sen. Dill).

[18]*See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business, but in some paragraphs, the language is simplified and clarified. These variances

(Footnote continued on next page)

ther provide that one of the reasons the Communications Act adopted the ICA provisions was "to preserve the value of court and commission interpretations of that act."[19]

As explained in detail below, the century of decisions confirms what the terms, structure, and consistent prior interpretations of the Communications Act themselves establish: (1) Section 203(b)(2) is not susceptible to the interpretation the FCC urges (Part I, *infra*); (2) even if Section 203(b)(2)'s terms were ambiguous, Section 203(b)(2) would have to be construed narrowly so that it neither nullifies the provisions that are "utterly central" to the Act nor permits the discrimination that the Act sought to end (Part II, *infra*); and (3) Congress has ratified the D.C. Circuit and earlier Second Circuit interpretations of Section 203(b) (Part III, *infra*).

I. THE LANGUAGE AND STRUCTURE OF THE ACT DO NOT PERMIT THE FCC TO ELIMINATE THE REQUIREMENT THAT ALL RATES BE FILED.

The D.C. Circuit correctly held that the FCC's interpretation of Section 203 "departs from any plausible reading of the statute's text." *MCI* v. *FCC*, 765 F.2d 1186, 1193 (D.C. Cir. 1985) (Cert. Opp. 14a) (Ginsburg, R.B., J.). The terms and structure of the Communications Act—and the history of the cognate provisions of the ICA—make it explicit that Section 203(b)(2) is simply not "susceptible" to a reading in which the FCC can exempt any carrier from the Section 203 requirement that it file all its charges. *AT&T* v. *FCC*, 978 F.2d at 735 (MCI Pet. 52a).

or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective."); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 2 (1934) (to same effect).

[19]H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934); *see also* Hearings on S. 2910 Before the Sen. Comm. on Interstate Commerce, 73d Cong., 2d Sess. 32 (1934), *reprinted in Paglin's Legislative History*, p. 154.

A. The FCC's Interpretation Is Foreclosed by the Plain Terms of the Act and Its Structure.

First, the FCC's position is foreclosed by the plain terms of Section 203. In pertinent part, Section 203 provides as follows (emphasis added):

> (a) *Every common carrier . . . shall . . . file* with the Commission and print and keep open for public inspection *schedules showing all charges* for itself and its connecting carriers for interstate and foreign wire or radio communication . . . *and showing the classifications, practices, and regulations affecting such charges* . . . .
>
> (b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public . . . .
>
> (2) *The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions* except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.
>
> (c) *No carrier*, unless otherwise provided by or under authority of this chapter, *shall engage or participate in such communication unless schedules have been filed* and published in accordance with the provisions of this chapter and with the regulations made thereunder; *and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication . . . than the charges specified in the schedule then in effect*, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

As the FCC concedes (Fed. Br. 17), Section 203(a) and 203(c) impose a mandatory obligation directly on each common carrier

to file "all" its charges. That the terms of Section 203(b)(2) do not allow *exemptions* of any carrier from this requirement is clear when Section 203(b)(2)'s terms are read in isolation, clearer when they are read in the context of Section 203 as a whole, and clearer still when considered in light of the central role of filed rates in the administration of other provisions of the Act that the FCC admittedly has no power to modify.

1. The FCC's Interpretation Violates the Plain Terms of Section 203(b)(2).

First, even when Section 203(b)(2)'s terms are read in isolation, they are not susceptible to the FCC's interpretation. Indeed, petitioners concede that the ordinary meaning of "modify" is not "eliminate," but "make minor changes in" and that this ordinary definition supports the D.C. Circuit's holding. *See* Fed. Br. 12, 19; MCI Br. 22.[20] However, they and their *amici* have located one dictionary (*Webster's Ninth New Collegiate Dictionary*, p. 763 (1988)) that defines "modify" to mean "make basic or fundamental changes in, often to give a new orientation to or serve a new end," including, in their view, exemptions. Fed. Br. 16, 17, 19; MCI Br. 21. On this basis, petitioners argue that this is a case in which there are "alternative dictionary definitions . . . each making some sense under the statute" and that the statute requires not only interpretation, but also deference to the FCC's current views. *See* Fed. Br. 35-36 & MCI Br. 21-22 (citing *National R.R. Passenger Corp.* v. *Boston and Maine Corp.*, 112 S. Ct. 1394, 1402 (1992)).

This claim is doubly wrong. First, there is no pertinent "alternative dictionary definition" that defines "modify" to mean "exempt," "revoke," or "eliminate." With the exception of *recent* editions of the *Webster's Collegiate Dictionary*, every dictionary of which AT&T is aware defines "modify" to mean changes that

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[20]The ordinary meaning of "to modify" is "to change somewhat the form or qualities of; alter partially; amend." *Random House Dictionary of the English Language*, p. 1236 (2d ed. 1987) (unabridged ed.). *Accord*, *Webster's Third New International Dictionary*, p. 1452 (1981) (unabridged ed.).

do not affect the essential features of a requirement.[21] Further, the language at issue in Section 203(b) of the Communications Act was first adopted as part of the ICA in 1906 (34 Stat. 586-87), and enacted in the Communications Act of 1934 (48 Stat. 1071), and the question here is what the term "modify" was understood to mean by the Congresses that enacted this language. At these relevant times, the then-current editions of even the *Webster's Collegiate Dictionary* did not contain the "alternative" definition on which petitioners now rely, but merely defined "modify" only as "change somewhat"[22]—as did other existing dictionaries.[23] In this regard, in 1933, this Court so held, stating that in their "usual meanings" the words "alter" and "modify" are not "equivalents of 'revoke.' " *Porter* v. *Commissioner*, 288 U.S. 436, 442 (1933). Thus, even if the word "modify" were viewed in isolation, its plain meaning would compel the D.C. Circuit's holding.

[21]*See* p. 17 n.20, *supra*. *See also The Oxford English Dictionary*, vol. ix, p. 952 (2d ed. 1989) ("to modify" is "[t]o make partial changes in; to change (an object) in respect of some of its qualities; to alter or vary without radical transformation"); *Ballentine's Law Dictionary*, p. 810 (3d ed. 1969) (distinguishing between the power to modify and the powers to create or abolish); *Black's Law Dictionary*, p. 1004 (6th ed. 1990) ("[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce"); *Webster's New Universal Unabridged Dictionary*, p. 1155 (2d ed. 1983) ("to limit or reduce slightly; to moderate"); *American Heritage Dictionary of the English Language*, p. 1161 (3d ed. 1992) (to same effect); *Webster's New World Dictionary*, p. 482 (2d concise ed. 1982) (same); *Webster's II New Riverside University Dictionary*, p. 762 (1988) (same).

[22]*See Webster's Collegiate Dictionary*, p. 628 (4th ed. 1934) ("[t]o limit or reduce in extent or degree" and "[t]o change somewhat in form or qualities; as, to *modify* a contract"); *id*., p. 628 (3d ed. 1930) (same); *id*., p. 642 (5th ed. 1947) (same). The first edition of this dictionary was published in 1898, and the definition to which petitioners allude was not added to the *Webster's Collegiate Dictionary* until the 7th Edition, which was first published in 1969.

[23]*See, e.g., Webster's New International Dictionary*, p. 1577 (2d ed. 1934) ("[t]o change somewhat the form or qualities of; to alter somewhat; as, to *modify* the terms of a contract"); *Webster's New International Dictionary*, pp. 1389-90 (1910) (to same effect); *Webster's International Dictionary of the English Language*, p. 935 (1903) (same); *Black's Law Dictionary*, p. 1198 (3d ed. 1933) (same), p. 787 (2d ed. 1910) (same), p. 783 (1891) (same); *see also Webster's American Dictionary of the English Language*, vol. ii (1828) (same).

Further, when the statutory term "modify" is read in the context in which it is used in Section 203(b)(2)—as it must be[24]—it is even clearer that Section 203(b) does not authorize exemptions from the filed rate requirements. Because Section 203(b)(2) only authorizes the FCC to "modify" a requirement of Section 203 "in particular instances" or in "special circumstances or conditions," it is patent that Section 203(b) authorizes, in the D.C. Circuit's words, only "circumscribed alterations—not, as the FCC would now have it, wholesale abandonment or elimination of a requirement" for any carrier that is deemed to lack market power.[25] *MCI* v. *FCC*, 765 F.2d at 1192 (Cert. Opp. 11a). That would allow the FCC to remove statutory filed rate requirements "in gross." *Id*. at 1193 (Cert. Opp. 14a).

2. The D.C. Circuit's Interpretation of Section 203(b) Is Supported by the Language of Section 203(c).

The D.C. Circuit's interpretation is also supported by the terms of Section 203(c). In particular, Section 203(c) supports what the plain meaning of Section 203(b) establishes: Section 203(b)(2) does not allow exemptions from statutory filed rate requirements, and exceptions can arise only from other provisions of the "chapter": *e.g.*, Section 332(c)(1)(A)'s authorizations of FCC exemptions for mobile carriers.

Section 203(c) provides that "unless otherwise provided by or under the authority of this chapter," no carrier shall provide communications services to any customer unless it has filed rate schedules and that no carrier shall charge any customer lower or different rates than those "specified" in "such schedules," either directly or through rebates, kickbacks, or any form of preference.

[24]Petitioners' proposed "alternative" interpretation of "modify" ignores that even a word with "many dictionary definitions . . . must draw its [statutory] meaning from its context" (*Ardestani* v. *INS*, 112 S. Ct. 515, 519 (1991)), and that a proposed "alternative" definition must make "some sense" in the statute before an ambiguity can be found. *Boston and Maine Corp.*, 112 S. Ct. at 1402.

[25]In this regard, as explained below, prior decisions otherwise make it explicit that the existence of competition, or a carrier's lack of market power, is not a circumstance or condition that permits an agency to exempt any carrier from the statutory filed rate requirements. *See* p. 26, *infra*.

MCI and the FCC claim that the "unless otherwise provided" phrase of Section 203(c) refers back to the "modification" authority of Section 203(b) (Fed. Br. 20-22; MCI Br. 23), and MCI claims that the language "makes clear" that Congress "contemplated" that the FCC could use its authority under Section 203(b) to "excuse carriers from statutory tariff obligations." MCI Br. 23.

That claim is meritless. It ignores the differences in wording between Section 203(b)(2) and Section 203(c). Whereas Section 203(b)(2) allows modifications to any requirement of this "section," Section 203(c) refers to exemptions from the requirements that arise from other provisions of the "chapter" (*i.e.*, all of the Communications Act). All Section 203(c) "makes clear" is that Congress understood that there are a number of other provisions of the Act that authorize (or allow the FCC to authorize) carriers to charge unfiled rates in narrowly defined circumstances, notwithstanding the filed rate requirements of Section 203.[26] Indeed, that Congress has enacted or authorized specific exceptions to the Section 203(c) requirement itself refutes any claim that the modification authority of Section 203(b) could have been intended to authorize exemptions from the requirements of Section 203(c).

3. The FCC's Interpretation Allows Modifications of Provisions of the Act That the FCC Has No Authority to Modify and Is Inconsistent with the Act's Structure.

In all events, the FCC's proposed interpretation of Section 203(b)(2) not only is foreclosed by numerous other provisions of the Communications Act, but also violates its very structure. Indeed, while the FCC claims a right to "modify any" requirement of Section 203, it does not, and could not, claim a right to modify other provisions of the Act. However, the existence of a filed rate is "utterly central" to numerous such other provisions

[26] *See, e.g.*, 47 U.S.C. §§ 201(b) & 211 (allowing services between carriers to be provided under contracts filed with the Commission); *id.* § 205 (requiring carrier to charge those rates the FCC "prescribes" as "just and reasonable," not filed rates); *id.* § 210 (allowing free service to employees or former employees); *id.* § 332(c)(1)(A) (authorizing the FCC to exempt mobile carriers from rate filing requirements).

of the Act (*Maislin*, 497 U.S. at 132), and the FCC's Order (and its claimed interpretation of Section 203(b)(2)) would not only modify, but in many instances nullify, other provisions of the Act that the FCC has no authority to change.

First, there are several provisions of the Act that are explicitly keyed to the filing of rates, or the existence of a filed rate. For example, the Section 415 right to recover "overcharges" (47 U.S.C. § 415) and the Section 204 right of a private party to file a complaint requesting, and the right of the FCC to order, suspension or investigation of a rate before it takes effect (*id.* § 204) presuppose that carriers have filed all their rates under Section 203(a). By removing rate filing obligations, the FCC is nullifying these other provisions of the Act. Indeed, *Maislin* discussed how "sanctioning adherence to unfiled rates" would undermine the basic structure of the ICA counterpart to Section 204. 497 U.S. at 132. "The [agency] cannot review in advance the reasonableness of *unfiled* rates." *Id.* (emphasis in original).

More fundamentally still, the FCC is authorizing the discrimination and preferences that are barred by another provision of the Act that the FCC concededly has no power to modify: Section 202(a). In this regard, petitioners are correct (*see* Fed. Br. 21; MCI Br. 23-24) that the FCC's interpretation of Section 203(b)(2) would mean that the FCC can (and has) exempted nondominant carriers that file tariffs (like MCI) from the Section 203(c) duty to follow their tariffs. These carriers would be exempted from Section 203(c)'s bans on secretly providing services to select customers at negotiated rates lower than existing filed rates, and on providing rebates, kickbacks, under-the-table payments or the like.[27] However, the FCC and MCI ignore that the conduct the FCC would authorize is not merely a violation of Section 203(c), but also constitutes the "very price discrimination" and preferences that Section 202(a) of the Act separately prohibits. *Maislin*,

[27] This exemption would also nullify the provision of Section 503 of the Act that provides for a "forfeiture" penalty of three times the amount of the rebate on any person who knowingly accepts "a rebate or offset against the regular charges for transmission of . . . messages as fixed by the schedules of charges provided for in this chapter." 47 U.S.C. § 503(a).

497 U.S. at 130. But the FCC has no authority to modify Section 202(a).

Finally, in addition to authorizing secret discounts, rebates, and kickbacks, the FCC's position otherwise effectively nullifies not only Section 202(a)'s unmodifiable ban on discrimination and preferences by any common carrier, but also Section 201's unmodifiable ban on "unjust or unreasonable" rates or practices by any common carrier. The FCC has not found—and could not find *ex ante*—that nondominant carriers will never violate these mandatory provisions. However, as the Court stated in *Maislin*, "[w]ithout [rate filing requirements] . . . it would be . . . virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates." *Maislin*, 497 U.S. at 132. Indeed, the reality is that violations of Sections 201(b) and 202(a) will go undetected if all "charges" are not filed and if the FCC merely relies on private party "complaints" to unearth violations of these provisions.[28] Because the FCC concededly has no authority to authorize violations of these provisions, this further shows that the FCC's interpretation of its modification authority under Section 203 would change other provisions of the Act that the FCC has no authority to modify.

In short, the FCC's detariffing policy would nullify the suspension and investigation provisions of the Act, obviate the provision relating to overcharges, eviscerate the Act's reasonable rate and nondiscrimination requirements, eliminate the key tool for preventing secret rebates, eliminate the statutory triple forfeiture penalties, and, indeed, revolutionize the very structure of the Act for a vast, potentially unlimited, number of common carriers. Even if such authority could be constitutionally delegated,[29] this

[28]The FCC's assertion that tariffing is unnecessary because "discovery procedures are available to obtain pertinent information" (Fed. Br. 34) cannot be taken seriously. As this Court recognized in *Maislin*, where secret rates are being charged, "other [customers] cannot know if they should challenge a carrier's rates." 497 U.S. at 132.

[29]If the FCC were correct that Section 203(b)(2) allows it to revolutionize the basic structure of the Act, subject only to the FCC's own determination that

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Court has made it clear that an agency may not "administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 517 (1988). *Accord*, *Dole* v. *United Steelworkers*, 494 U.S. 26, 42 (1990). These principles independently foreclose the FCC's proposed interpretation of Section 203(b)(2).[30]

4. The D.C. Circuit and Second Circuit Interpretations Allow Modifications of "*Any* Requirement" of Section 203.

It is for these reasons that each court of appeals to consider the issue—the Second Circuit in 1973 and 1978[31] and the D.C. Circuit in its 1985, 1992, and 1993 decisions at issue here—has held that the plain terms of the statute will not bear the interpretations that the FCC urges. Each has held that Section 203(b)(2) authorizes the FCC to modify the notice period and the form and contents of required rate schedules, but not the core requirement that all charges, and all classifications and practices affecting them, be filed. *See MCI* v. *FCC*, 765 F.2d at 1192-95 (Cert. Opp. 11a-19a).

"good cause" had been shown, serious questions would be raised about whether Congress may delegate such sweeping authority to an agency guided only by such a nebulous standard. *See Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality); *id.* at 685-88 (Rehnquist, J., concurring in the judgment). "A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.* at 646 (plurality).

[30]Petitioners' reliance on this Court's descriptions of the Communications Act as a "supple instrument" is misplaced. *See* Fed. Br. 38; MCI Br. 18, 24. Each such case cited by petitioners arose under not Title II, but Title III, and the principle, in any event, cannot be used to override explicit statutory limitations on the FCC's authority.

[31]*AT&T* v. *FCC*, 572 F.2d 17 (2d Cir. 1978); *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir. 1973). The Second Circuit held that "[t]he Communications Act requires that common carriers . . . file their tariffs with the FCC, 47 U.S.C. § 203(a)" (*AT&T* v. *FCC*, 572 F.2d at 25), and that "under Section 203(b) the Commission may only modify requirements as to the form of, and the information contained in, tariffs and the [then] thirty days notice provision." *AT&T* v. *FCC*, 487 F.2d at 879.

Contrary to the FCC's claim (Br. 12, 18, 19), these holdings give full effect to Section 203(b)(2)'s provision that the FCC may "modify *any* requirement of [Section 203]." *See also* MCI Br. 21. At bottom, Section 203 imposes two requirements on every common carrier: (1) that each file schedules with the FCC showing "all" charges for itself, and all classifications, practices, and regulations affecting such charges,[32] and (2) that it do so on 120 days notice. Under the holdings of these circuits, the FCC can modify each of these requirements. First, the FCC can shorten, and has shortened, notice periods to as little as one day. Second, the FCC can alter, and has altered, the rate filing requirements themselves. It can alter the form and content of rate schedules (*e.g.*, by allowing the filing of customized or other contract tariffs and other alternatives to traditional rate schedules)[33] and can even alter the jurisdiction where they are filed by allowing rates for local facilities that are predominantly used for intrastate services to be filed at the states, rather than the FCC, unless and until the FCC issues preemptive orders.[34] Indeed, virtually all of MCI's, the FCC's,

[32]Section 203(c)'s ban on provision of service at secret unfiled rates is simply the flip side of the requirement that all charges be filed. If a firm violates Section 203(c) by providing service at secret unfiled rates, the violation exists because the carrier has not filed "all" its charges as required by Section 203(a).

[33]For example, the FCC (like the ICC before it) authorized AT&T (and other carriers) to develop customized and other service arrangements that are initially developed for a single customer. It allows these arrangements to be developed and filed either as traditional rate schedules (*see MCI* v. *FCC*, 917 F.2d 30 (D.C. Cir. 1990)) or filed as "contract tariffs" (*see Competition in the Interstate Interexchange Marketplace*, 5 FCC Rcd. 2627, 2642 (1990); *id.*, 6 FCC Rcd. 5880, 5897 (1991)). The FCC also can, and has, otherwise allowed carriers to file rates in whatever format was most convenient, without regard to requirements of the FCC regulations. *See* Public Notices, 8 FCC Rcd. 744 & 8 FCC Rcd. 3927 (1993). In all these cases, however, the *rates* are filed such that the FCC can assure that the charges are "just and reasonable" as required by Section 201(b) (*compare Federal Power Comm'n* v. *Texaco Inc.*, 417 U.S. 380 (1974)), and (2) the rates are known to all such that similarly situated customers can demand and receive equal rates as required by Section 202(a). *See MCI* v. *FCC*, 917 F.2d 30, 34-35 (D.C. Cir. 1990).

[34]Indeed, while rejecting the FCC's proposed interpretation of Section 203(b), the D.C. Circuit and the Second Circuit have each acknowledged the FCC's

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and their *amici's* purported policy arguments evaporate when these facts are acknowledged.[35]

Conversely, because the provisions of the statutory scheme all centrally depend on the filing and publication of "all" charges by "every" common carrier—and because, as explained below, *secret* rates are the very evil that the Act was designed to prevent—the plain terms of the Act foreclose the claim that Section 203(b)(2) authorizes the FCC to exempt carriers from the requirements that they publish and file "all" their rates, and charge only those rates that have been filed.

B. The Limited Scope of Section 203(b)(2) Is Confirmed by the Uniform Interpretations of the Cognate Provision of the Interstate Commerce Act.

That Section 203(b) does not confer the sweeping authority that petitioners claim is confirmed by the consistent interpretations of the cognate provision of the Interstate Commerce Act. In particular, Section 203(b)(2) was directly modelled on, and designed to achieve the same objectives as, Section 6(3) of the ICA. *See* p. 14 & nn.13,18, *supra*. As it stood in 1934 (and as it stood from 1906 until 1978), Section 6(3) stated in relevant part as follows:

authority to defer to state regulation in setting charges for purely local facilities that are primarily used for intrastate services, but are also jointly used to provide services that are interstate. *See Diamond International Corp.* v. *FCC*, 627 F.2d 489, 492-94 (D.C. Cir. 1980); *New York Telephone Co.* v. *FCC*, 631 F.2d 1059, 1065 (2d Cir. 1980). Here, too, the arrangements were consistent with the Act because the rates were filed and published—which enabled federal claimants, and the FCC, to monitor the rates and enabled the FCC to take preemptive action when the rates filed at the states were discriminatory or otherwise inconsistent with the Act. *See New York Telephone Co.*, 631 F.2d at 1067. Indeed, the FCC ultimately asserted exclusive jurisdiction over the jurisdictionally interstate aspects of facilities at issue in both *Diamond* and *New York Telephone*. *See* IBM Amicus Br. 7 n.9.

[35]These facts foreclose (1) IBM's claims that the D.C. Circuit holdings would disrupt state jurisdiction (*compare* IBM Amicus Br. 3-10 & 20-21 *with* p. 24 n.34, *supra*), (2) MCI's claims that rate filing requirements are incompatible with customized service requirements (*compare* MCI Br. 12 n.18 *with* p. 24, n.33, *supra*), and (3) the FCC's claims that rate filings are costly and burdensome. *Compare* MCI Pet. 27a, 29a *with* p. 24 n.33, *supra*.

> [T]he commission may, in its discretion and for good cause shown, . . . modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions . . . .

49 U.S.C. App. § 6(3).

Far from being understood to be "broad language" (Fed. Br. 16), the terms of Section 6(3) had been consistently construed by the ICC as allowing modifications of rate filing requirements only in cases of "actual emergency." *Acme Cement Plaster Co.* v. *St. Louis & San Fran. R.R.*, 22 I.C.C. 283, 285 (1912). And in contrast to the FCC's current claim, the ICC held that it had no authority to grant modifications or changes in the absence of "actual emergencies" even when competition existed that allegedly precluded carriers from charging supracompetitive rates. *See Changes in Schedules to Meet Water Competition*, 176 I.C.C. 217, 222-23 (1931). The ICC found this "restrictive" construction to be compelled both by the anti-discrimination provisions of the ICA and by the structure of the Act (*see, e.g., id.* at 220-21, 223-24), and shortly before the Communications Act was adopted, the ICC stated that it had "always"—indeed, more than 100,000 times—acted upon this understanding that the authority under Section 6(3) was limited and narrow. *Id.* at 222-23.

When Congress imported Section 6(3) into Section 203(b), it legislated in light of this settled understanding of the limited circumstances that can constitute "good cause" and "special circumstances or conditions." Indeed, one of the reasons for adopting the framework of the ICA was "to preserve the value of court and commission interpretation of that act." H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934); *see also* pp. 14-15 nn.18-19, *supra*.

In any case, that this modification authority has never been understood to authorize exemptions from statutory filed rate requirements is confirmed both by the subsequent actions of Congress and by the uniform ICC and court decisions. In particular, one year after it enacted Section 203 of the Communications Act, Congress subjected both motor common carriers and motor contract carriers to the same mandatory rate filing requirements as railroads and telephone and telegraph carriers.[36] In each instance, Congress conferred the same "modification" authority on the ICC as it had previously granted in Section 6(3) and Section 203(b).[37] However, in the very same section where Congress conferred the *modification* authority, it also authorized the ICC to *exempt* motor *contract* carriers, but not motor common carriers, from rate filing requirements.[38] This is legislative recognition that the "modification" authority does not allow exemptions from rate filing requirements. *See Maislin*, 497 U.S. at 135; *Regular Common Carrier Conf.* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986).[39]

The point is further confirmed by the 1978 legislation that recodified the Interstate Commerce Act. Congress's objective was to consolidate the four separate parts of the Act (governing railroads, truckers, water carriers, and freight forwarders), and the statute expressly provided that it "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 (1978). In so recodifying, Congress placed the analogues of Section 203(a) and Section 203(b) (former ICA §§ 6(1) and 6(3)) into one section of the ICA (new § 10762), and placed the analogue of Section 203(c) (former ICA

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[36] *See* Motor Carrier Act of 1935 §§ 217 (common carriers), 218 (contract carriers), 49 U.S.C. App. §§ 317, 318.

[37] *See id.* §§ 217(c) & 218 (first proviso, fourth sentence), 49 U.S.C. App. §§ 317(c), 318.

[38] *See id.* § 218 (second proviso), 49 U.S.C. App. § 318.

[39] There is other evidence that Congress has never regarded the language of Section 203(b)(2) as affording federal agencies the power the FCC here asserts. For example, the Civil Aeronautics Board ("CAB") had the same "Section 6(3)" and "203(b)" authority to "modify" rate filing requirements as did the FCC and the ICC. *See* 49 U.S.C. § 1373(c) (1976) (amended by Pub. L. 95-504, § 22, 92 Stat. 1724). However, Congress plainly thought that power insufficient to accomplish detariffing, for in 1978, Congress granted the CAB the authority to "*exempt*" any person from these, and other, requirements of that statute. Airline Deregulation Act of 1978, Pub. L. 95-504, § 31, 92 Stat. 1731-32 (amending 49 U.S.C. § 1386(b)) (emphasis added); *see* S. Rep. No. 631, 95th Cong., 2d Sess. 85-86 (1978) (amendment "need[ed]" to provide "a flexible and broad exemption power").

§ 6(7)) into another section (new § 10761). The net effect is that the ICC's modification authority does not apply to either of the obligations covered by Section 203(c)'s analogue (former ICA § 6(7))—the obligation to file rate schedules in order to provide service and the obligation to adhere to those rates. Because this legislation was explicitly designed not to change the law, this Congressional Act confirms that neither original ICA Section 6(3) nor Section 203(b) of the Communications Act had been understood to confer the authority that the FCC now claims.

Subsequent decisions by both the D.C. Circuit and the ICC itself further confirm the narrow scope of this modification authority. First, the ICC has consistently adhered to the non-expansive view of the modification authority that the FCC now rejects. In 1985, for example, the ICC concluded that it did not have the authority to make optional the filing of certain rates, but that its modification authority allows only changes in the "technical steps of publishing, posting and filing, and does not extend to the general obligation of tariff filing." *International Joint Through Rates Involving Ocean Carriers*, 1 I.C.C.2d 978, 981-82 (1985). Because the 1978 recodification could not be construed as changing the law, the ICC relied on the ground that it had had no authority to modify core filing requirements under "the pre-recodification version of the Interstate Commerce Act." *Id*. The ICC reaffirmed this non-expansive interpretation of its modification authority in 1993, when it held that it had no authority to allow the filing of "tariffs" that do not specify "the per-unit rate" that each shipper pays. *Range Tariffs of All Motor Common Carriers*, ICC Nos. 40887 et al., 1993 MCC LEXIS 112 at *25 (Aug. 2, 1993).

Similarly, in *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) (Scalia, J.), the court held that the ICA modification authority could not be used to authorize any carrier (there, a freight forwarder) to file tariffs containing merely its "average rates"—and determine the actual rate paid by each customer through negotiations and secret contracts. Because it is "utterly central" to the statute that the actual rate

paid by each customer be filed in, or ascertainable from, the carrier's tariffs, the court held that "what the Commission has done here goes beyond 'chang[ing] the . . . requirements of this section' " and could not be authorized by the modification provision of the Act. *Id*. at 379 (quoting 49 U.S.C. §10762(d)(1)). In so holding, the court noted that the modification provision appeared only in the counterpart to Section 203(a), but ultimately relied on the ground that the statutory provision authorizing exemptions for contract carriers establishes that the modification authority could not itself authorize exemptions of other carriers from the core rate filing requirement. *Id*.

In short, the FCC's proposed interpretation is foreclosed by the over 80 years of consistent interpretations by the ICC, Congress, and the courts of the cognate provision of the ICA on which Section 203(b) was based. Indeed, that the FCC itself was formerly emphatic in agreeing with the D.C. Circuit's and Second Circuit's interpretation (*see* pp. 4-5, *supra*) is further evidence that the language is susceptible to no other reading.

II. THIS COURT'S CONSISTENT DECISIONS FOR A CENTURY FORECLOSE THE FCC'S CLAIM THAT SECTION 203(b)(2) CAN BE CONSTRUED TO UPHOLD A DETARIFFING RULE.

Even if the terms of Section 203(b)(2) were ambiguous, a century of this Court's decisions establishes both that Section 203(b)(2) cannot be construed to authorize exemptions from statutory filed rate requirements and that the FCC cannot rely on competition or other "indirect" methods to ensure compliance with statutory requirements that rates be non-discriminatory and just and reasonable. These decisions establish that the rate publication requirement, and the ban on secret rates, are so fundamental to the statutory purposes that even general and facially applicable statutory provisions of law cannot be interpreted to authorize secret rates—unless these statutory provisions represent express Congressional exemptions from the statutory filed rate requirements. This is the holding of *Maislin* and its numerous precursors.

A. This Court's Filed Rate Decisions Establish That General or Ambiguous Provisions of Law, However Broad, Cannot Be Construed to Authorize Secret Rates, Irrespective of the Existence of Competition.

Nearly 100 years of decisions of this Court establish that exceptions to statutory filed rate requirements cannot be inferred or adopted from general or ambiguous statutory provisions of law, and that, in all events, the existence of competition cannot be relied upon to secure the objectives of the filing requirements. These holdings simply reflect the fact that the fundamental purpose of the ICA, and of the rate filing requirements of acts modelled on the ICA, was to secure *equal* as well as reasonable rates for all similarly situated customers by requiring "the fullest publicity" of carrier rates and practices, irrespective of the degree of competition in the industry. S. Rep. No. 46, Part I, 49th Cong., 1st Sess. 198 (1886) ("*Cullom Report*").

In this regard, it is ironic that petitioners repeatedly note that communications was a monopoly in 1934, but that long distance services are now competitive. *See, e.g.*, Fed. Br. 15; MCI Br. 22. Apart from misstating the 1934 conditions, petitioners ignore that the ICA was not designed merely to prevent uses of market power to charge excessive rates or to effect the kinds of price discrimination that violate the antitrust laws. The paramount purpose of the ICA was to prevent unequal rates among similarly situated customers, and Congress found that the prohibition against "unreasonable" discrimination in charges for like services cannot be enforced unless all individually negotiated rates are filed and similarly situated customers can thus know of, demand, and receive the same rates.[40] In this connection, Congress specifi-

[40]For example, customers who face different competitive conditions are not similarly situated, and rate differences that result solely from differences in "competitive conditions" do not constitute the "unreasonable discrimination" that the statute prohibits. *Sea-Land Services, Inc.* v. *ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984); *see Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194, 207-08 (1944). However, unless individually negotiated rates are filed, the similarly situated customers who face identical competitive conditions will not know of, and cannot demand, the same rate, and the statutory ban on discrimination would be violated. *Sea-Land*, 738 F.2d at 1316-19; *accord MCI* v. *FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990).

cally concluded that, whereas monopolists have no reason to charge unequal rates to similarly situated customers, rate differences are "most conspicuous when and where competition is present." *Cullom Report*, p. 189. In short, the ICA rested on Congressional findings that whereas "competition [is] a safeguard against extortion" (*i.e.*, the excessive rates that are the evil of monopoly), "experience has shown that it [will be] no safeguard against [the] discrimination" that the ICA sought to prevent unless all rates are also filed. *Id.*, pp. 191–92; *see also id.*, pp. 187-90 & 198-208.

Thus, most of the industries that Congress has subjected to filed rate requirements, either in the ICA or in acts modelled on the ICA, are competitive. For example, in addition to the substantial long-haul railroad competition known to exist when the ICA was passed (*see* p. 30, *supra*), Congress was well aware that competition existed in the *telegraph* business when it passed the Communications Act in 1934.[41] Yet Title II of the Act nonetheless was applied to telegraph carriers no less than telephone companies. In addition, Congress has imposed the filed rate provisions that were originally developed for the railroad industry on the trucking, freight forwarding, commercial shipping,[42] and civil aviation industries,[43] in each case without respect to whether these industries could possibly be described as monopolies. It is thus incredible for the FCC now casually to contend that "competition" and "lack of market power" can constitute "special

[41]*See* Study of Communications by an Interdepartmental Committee, 73d Cong., 2d Sess., transmitted to the President, from the Secretary of Commerce, p. 11 (Jan. 23, 1934), *reprinted in Paglin's Legislative History*, p. 115; *see also MCI* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985), Brief of MCI, pp. 43-44 & n.122 (discussing competition in the telephone and telegraph industries in 1934). At that time, the relative importance of telegraph service vis-a-vis long-distance telephone service was radically greater than it is now.

[42]Shipping Act of 1916, Act of Sept. 7, 1916, ch. 451, § 18, 39 Stat. 735, codified as amended at 46 U.S.C. § 817(a).

[43]Civil Aeronautics Act, Act of June 23, 1938, ch. 601, § 403, 52 Stat. 992-93 (formerly codified at 49 U.S.C. § 483); Federal Aviation Act of 1958, Pub. L. 85-726, § 403, 72 Stat. 758 (replacing Section 403 of the 1938 Act; formerly codified at 49 U.S.C. § 1373 and then repealed by Airline Deregulation Act of 1978, Pub. L. 95-504, § 1601, 92 Stat. 1745, which is itself codified in scattered sections of 49 U.S.C.).

circumstances" under Section 203(b)(2) of the Communications Act and allow the FCC to "exempt[ ]" carriers "from the tariff filing requirement." *See* Fed. Br. 32.

Indeed, for a century, this Court's decisions have emphasized that the requirement that all carriers file all their rates, and charge only filed rates, is the fundamental provision of the ICA and other statutes modelled on it, and that no provision of the Act can be construed to allow rates to be set by secret means. For example, in *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908), the Court emphatically held that the Act could not be construed to permit any carrier to set, or charge, rates by private unfiled contracts. The Court stated:

> If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, *known to all*, and from which neither shipper nor carrier may depart. [¶] It is said that if the carrier saw fit to change the published rate by contract, the effect will be to make the rate available to all shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. *Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.*

Id. at 81 (emphasis added).[44]

Because of the centrality of the rate filing requirements to Congress's purposes, the Court has consistently interpreted other provisions of law so as to preserve the integrity of the filed rate obligation. For example, in *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the Court gave a narrow

[44]*Accord, Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932); *Atchison, T. & S.F. Ry.* v. *Robinson*, 233 U.S. 173, 181 (1914); *Kansas City So. Ry.* v. *C.H. Albers Comm'n Co.*, 223 U.S. 573, 597 (1912); *Robinson* v. *Baltimore & O. R. Co.*, 222 U.S. 506, 508 (1912); *Southern Ry.* v. *Reid*, 222 U.S. 424, 438 (1912); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439 (1907); *New York, N.H. & H. R.R.* v. *ICC*, 200 U.S. 361, 391 (1906).

construction to the broad and facially applicable "savings" clause in the original ICA in order to assure that state court litigation could not alter, through settlements or even through judgments, the lawful rates duly filed with the ICC and produce the unequal rates that the Act sought to prevent. The Court explained that "there is not only a relation, but *an indissoluble unity* between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against undue preferences and discriminations." *Id.* at 440 (emphasis added).

Similarly, in *Keogh* v. *Chicago & Northwestern Railway*, 260 U.S. 156 (1922), the Court narrowly construed the facially applicable, and broad, provisions of Section 1 of the Sherman Act to assure that "[t]he legal rights of shipper as against carrier in respect to a rate [would continue to be] measured by the published tariff." *Id.* at 163. The Court held that "[t]his stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated." *Id.* In *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), the Court reaffirmed *Keogh* (over the objection of the United States), holding that "[i]f there is to be an overruling of the [filed rate doctrine], it must come from Congress rather than from this Court." *Id.* at 424; *see id.* at 417-24.[45]

[45]The FCC suggests (Br. 18) that an earlier case under the Natural Gas Act (*Permian Basin Area Rate Cases*, 390 U.S. 747, 786-87 (1968)) had established the contrary by upholding a Federal Power Commission decision that relieved small gas producers "from various ratefiling and reporting obligations." However, quite apart from the fact the Court was not construing an analogue to Section 203(b)(2), the filing obligations to which the Court referred arose under Sections 5 and 7 of the Natural Gas Act (15 U.S.C. §§ 717d, 717f), *not* the provision of Section 4 (15 U.S.C. § 717c) that contains statutory rate filing requirements. *Id.*

Further, in the subsequent decision in *FPC* v. *Texaco Inc.*, 417 U.S. 380 (1974), this Court rejected any such claim when it upheld the FPC's system of regulation of rates of small producers who are not common carriers and had no relevant nondiscrimination duty. The Court upheld the order *only because* those producers had no dealings with ultimate consumers and because their rates would be filed with the FPC and would be scrutinized as part of the costs of

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If there were any doubt that these settled understandings have continuing vitality, they were resolved by this Court's 1990 decision in *Maislin*. The Court there struck down an attempt by the Interstate Commerce Commission to avoid the "filed rate doctrine" through its statutory authority to proscribe "unreasonable practices." 49 U.S.C. § 10701. Specifically, the Court overturned the ICC's *Negotiated Rates* policy, which attempted to forbid a carrier to collect the filed rate after the carrier had previously negotiated a lower rate with a shipper, misled it into believing the negotiated rate had been filed, and then billed the shipper at that negotiated rate for months or even years. The ICC had justified this policy on the grounds that a narrow exception to the filed rate doctrine was needed to prevent a windfall to the carrier and that competition among motor carriers would prevent discrimination or unreasonable rates in this narrow circumstance.[46]

In *Maislin*, this Court did not deny that the ICC's power to regulate "unreasonable practices" is conferred in "language of the broadest scope" (*United States* v. *Baltimore & O. R.*, 333 U.S. 169, 175 (1948)) and that, viewed in isolation, it would justify the ICC's policy. Instead, *Maislin* examined the structure of the ICA as a whole and the many decisions of this Court construing it. 497 U.S. at 126-32 (citing cases). It concluded that "[t]he duty to file rates with the Commission, and the obligation to charge only

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service of pipelines (or large producers) with whom the small producers dealt. 417 U.S. at 390. Even then, however, the Court vacated the FPC's order to the extent that it might do what the FCC's Order at issue here in fact does: rely solely on market forces to assure that rates are "just and reasonable" under the statute. *Id.* at 399. Contrary to the FCC's suggestion (Br. 18), the Court held that no provision of the Natural Gas Act could be construed to "authorize the Commission to set at naught an explicit provision of the Act" and that "[n]o producer is exempt from § [ ] 4 [which includes the statutory rate filing requirement]." 417 U.S. at 394.

[46]497 U.S. at 121-22 & nn.3-4. *See NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623, 625 (1989) (in circumstances covered by *Negotiated Rates* policy, "rigid enforcement of the filed rate doctrine" would, among other things, "frustrate the national transportation policy of encouraging pricing innovation and competition, and would not be necessary to prevent discrimination").

those rates, have always been considered essential to preventing price discrimination and stabilizing rates." *Id.* at 126 (citations omitted). The Court further stated that to allow the carrier to charge a secret rate lower than the filed rate would constitute the very discrimination that the Act was designed to prevent. *Id.* at 130. The Court accordingly held that, whatever the ICC's "unreasonable practices" authority might encompass, it could not be interpreted by the ICC to enforce unfiled rates, because this would undermine requirements " 'utterly central' to the administration of the Act." *Id.* at 132 (quoting *Regular Common Carrier Conference*, 793 F.2d at 379). Significantly, the Court also rejected the claim that competition could justify exceptions to the filed rate requirements. *Id.* at 134-35.

Maislin compels the rejection of the FCC's interpretation of its Section 203(b)(2) "modification" authority. There, as here, a federal administrative agency sought to interpret one of its delegated powers to override the central rate filing obligations of the Act. This Court's conclusion that the obligations of the filed rate doctrine cannot be indirectly eliminated by declaring them "unreasonable practice[s]" necessarily means that the FCC cannot directly eliminate the filed rate requirements for virtually all long-distance carriers under putative "modification" authority.

Indeed, *Maistin* presented a far more compelling case for relaxation of the filed rate doctrine than does the present case. The "unreasonable practices" provision relied upon by the ICC in that case was a far broader and more open-ended source of administrative authority than the narrowly confined power to "modify" rate filing obligations "in particular instances or by general order applicable to special circumstances or conditions" at issue here. 47 U.S.C. § 203(b)(2). Moreover, the ICC in *Maislin* sought only to qualify the obligation of carriers to observe their filed rates in one narrow circumstance—where necessary to prevent fraud and a windfall. Here, in contrast, the FCC seeks to adopt a broad, and potentially unlimited, exemption from the basic requirement that carriers file all their rates and charge only filed rates.

In *Maislin*, moreover, all nine members of the Court agreed on the issue presented in this case: that the ICC could not generally

exempt any common carrier from its obligations to file all its rates and to charge only filed rates and that the carrier there had violated both these provisions by initially failing to file the negotiated rate and by thereafter initially failing to seek payment of the filed rate. *Compare* 497 U.S. at 126-136 (Opinion for the Court) *with id.* at 141-44 & n.6 (Stevens, J. dissenting). By contrast, the only point on which the dissent of Justice Stevens (joined by the Chief Justice) disagreed with the majority was whether a carrier's inequitable conduct of bringing a lawsuit to collect—and its recovery of—undercharges could be declared an "unreasonable practice," and thus unlawful, when the carrier had misled the shipper into believing that the negotiated rates had been filed. *See* 497 U.S. at 142 n.6 (Stevens, J., dissenting). This case involves no such inequitable conduct, but only the FCC's belief that the public interest would be served by a different regulatory scheme from the one adopted by Congress.

Further, *Maislin* and its precursors squarely foreclose all the grounds on which the FCC has sought to justify its "permissive detariffing" rule. As did the ICC's order in *Maislin*, the FCC's Order rests on the ground that the existence of competition, and a carrier's lack of market power, mean that the carrier will be unable to charge "unjust and unreasonable" rates (in violation of Section 201(b)) or "discriminatory" rates (in violation of Section 202(a)) and that the goals of the statute will be better served by other means. *See, e.g.*, MCI Pet. 26a-31a. But these arguments ignore that the statute does not allow the FCC to seek to achieve these ends by such "indirect and uncertain methods." *Armour Packing*, 209 U.S. at 81. In the Communications Act (as in the ICA), Congress has not merely prohibited "unreasonable" and "unequal" rates. It "also prescribed the manner in which that prohibition should be enforced": by requiring that each carrier file all its rates and charge only filed rates. *Robinson* v. *Baltimore & O. R. Co.*, 222 U.S. 506, 508 (1912). As this Court has more recently held, "[i]t is not the Court's [or the FCC's] role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act." *FPC* v. *Texaco*, 417 U.S. at 400.

Finally, *Maislin* forecloses petitioners' claim that this Court would have to defer to the FCC's interpretation of Section 203(b) if its terms were ambiguous (as they are not). *See* Fed. Br. 34-38 & MCI Br. 19-26 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984)). In particular, *Maislin* squarely rejected the ICC's claims that *Chevron* required deference to the ICC's interpretation if its "construction [was] rational and consistent with the statute." *Maislin*, 497 U.S. at 130.

> We disagree. For a century, this Court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. . . . "[The Act] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate." . . . Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.

Id. at 130-31 (quoting *Armour Packing*, 209 U.S. at 81). *See id.* at 136-38 (Scalia, J., concurring). *Accord*, *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847-48 (1992).[47]

B. There Is No Basis for Petitioners' Attempted Distinctions of *Maislin*.

Petitioners' attempts to distinguish *Maislin* are unavailing. First, petitioners note that *Maislin* was "decided under a different

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[47]Even if this were a case where ambiguity in the statute or lack of precedent required consideration of the agency's view, the FCC's interpretation of Section 203(b)(2) would not be entitled to deference. Foremost, the ICC does not share —and has rejected—the FCC's interpretation of the scope of the agencies' modification power. *See* pp. 26, 28, *supra*. Thus, to accept the FCC's interpretation, the Court would have to reject the longstanding ICC interpretation—or determine, at least implicitly, that both "diametrically opposite" interpretations are entitled to deference and thereby be "reduced to . . . total abdication in construing the statute." *Compare General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 144-45 (1976); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 522-23 n.12 (1982).

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statute (the Interstate Commerce Act rather than the Communications Act)." Fed. Br. 28; *see id.* at 27-29; MCI Br. 31-34. This contention is irrelevant to the question whether *Maislin* is controlling in the present context.

Petitioners do not question that Congress took the relevant language of Section 203 virtually verbatim from Section 6 of the ICA as it stood in 1934. *See* pp. 13-14, *supra*. As a general rule, language in one statute borrowed from even an unrelated earlier enactment will be construed the same way as the prior enactment (*see, e.g.*, *Morales* v. *TWA*, 112 S. Ct. 2031, 2037 (1992); *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 746-47 (1988)), and here Congress expressly intended the Communications Act to achieve the same goals as the ICA. *See* pp. 14-15 & nn.17-18, *supra*.[48] And this Court has held that statutes based on the ICA should be interpreted on the basis of precedents under the earlier Act. In *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), the Court was confronted with an issue under the Shipping Act of 1916, which "[i]n its general

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In this context, it is thus also pertinent that the FCC "has arrived at its fully expanded view of section 203(b)(2) rather lately." *MCI* v. *FCC*, 765 F.2d at 1192 (Cert. Opp. 13a). At least through 1980 the FCC "shared, indeed fostered, the judicial perception of the statutory tariff-filing requirement for common carriers" and understood that this requirement could not be "removed in gross by agency order." *Id.* at 1193 (Cert. Opp. 14a). The square conflict with the ICC's interpretation and inconsistency in the FCC's interpretation of its authority under Section 203(b)(2) means the FCC's current position can be afforded little deference. *Cf. INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

[48]When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); *see also Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2042-43 (1993); *Dewsnup* v. *Timm*, 112 S. Ct. 773, 779 (1992); *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Env. Protection*, 474 U.S. 494, 501 (1986). "That presumption is particularly appropriate" where, as here, Congress has "exhibited both a detailed knowledge of the [Act's] provisions and their judicial interpretations and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard*, 434 U.S. at 581; *see* p. 14 nn.16-18, *supra*.

scope and purpose, as well as in its terms, . . . closely parallels the Interstate Commerce Act." *Id.* at 481. The Court concluded:

> [W]e cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion.

Id. This principle is uniformly followed by federal courts.[49] It is controlling here, because whether or not the two statutes are otherwise " 'carbon cop[ies]' " (MCI Br. 33),[50] petitioners have not identified—and cannot identify—a single difference that is relevant to the issue before the Court.

Second, petitioners argue that *Maislin* did not consider the question of "the ICC's power to promulgate rules modifying tariff filing requirements under the ICA," and did not, by necessary

[49]*See, e.g.*, *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 612 n.12 (1966); *MCI Telecommunications Corp.* v. *FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) ("The Communications Act, of course, was based on the ICA and must be read in conjunction with it."); *MCI Telecommunications Corp.* v. *Graham*, 7 F.3d 477, 479-80 (6th Cir. 1993) (same proposition); *ABC, Inc.* v. *FCC*, 643 F.2d 818, 821 (D.C. Cir. 1980) (same); *Diefenthal* v. *CAB*, 681 F.2d 1039, 1045 (5th Cir. 1982) (same proposition for Federal Aviation Act of 1958); *Towns of Concord, Norwood, and Wellesley* v. *FERC*, 955 F.2d 67, 70-71 (D.C. Cir. 1992) (same for particular provisions of Federal Power Act); *McCleneghan* v. *Union Stock Yards Co.*, 298 F.2d 659, 666 (8th Cir. 1962) (same for 1921 Packers and Stockyards Act).

[50]In this regard, MCI's reliance on *AT&T* v. *FCC*, 503 F.2d 612, 616 (2d Cir. 1974), is misplaced. It held only that the FCC could extend the statutory 30 day notice period because the Communications Act did not *then* contain the explicit prohibition of enlarging notice periods that was contained in the ICA. That difference has no pertinence to any issue in this case.

That is especially so because Congress thereafter amended Section 203(b) by making the notice period 120 days, by prohibiting the FCC from enlarging it, and by *not disturbing* the Second Circuit's holding (reaffirmed in that case) that Section 203(b) only allows changes in the form and contents of rate filings and the notice period. 90 Stat. 1080 (1976) (amending Section 203(b)); H.R. Rep. No. 1315, 94th Cong., 2d Sess. 13, 15, 18, 19 (discussing Second Circuit's holdings).

implication, reject the broad reading of the ICC's analogue to Section 203(b)(2) (today, Section 10762(d)). MCI Br. 32. Even if this were true,[51] it, too, would be irrelevant. None of the century of cases upon which *Maislin* stood had construed the scope of the ICC's authority to prohibit "unreasonable practices" under the counterpart to Section 201(b) of the Communications Act. But the prior decisions were nonetheless held to be controlling in *Maislin* in that they established that the requirements that all carriers file all their rates (under Section 203(a)'s analogue), and charge only filed rates (under Section 203(c)'s analogue), are so fundamental to the structure of the Act—and so central to assuring that rates are just, reasonable, and, in particular, non-discriminatory—that they can be altered only if Congress does so expressly. This holding forecloses the broad construction of Section 203(b)(2) of the Communications Act sought by petitioners, just as it foreclosed a broad construction of the ICA ban on unreasonable practices. *See* 497 U.S. at 130-36.

Petitioners thus miss the point in noting that the analogues of Section 203(a) and 203(b) are now located in a different section of the ICA (§ 10762) from the analogue to Section 203(c) (§ 10761). *See* Fed. Br. 28-29; MCI Br. 33. Even if this difference were otherwise germane to the issue *Maislin* resolved, it could not have the slightest significance to the issue before the Court. This "difference" between the two statutes did not arise until the ICA was recodified in 1978. No one disputes that the rate filing provisions of the ICA were identical in all material respects to those of the Communications Act *prior* to 1978. Petitioners are thus necessarily claiming that the ICC previously had the broad modification authority that the FCC now claims, but that Congress subtracted from this authority when it recodified the ICA in

[51]It is true that the ICC did not attempt to justify its *Negotiated Rates Policy* under its Section 10762(d) modification authority. However, the Court stated that Congress had only authorized exemptions from rate filing requirements for contract carriers and that any further exemptions must come from Congress (497 U.S. at 136), and the Court reserved decision on the question whether the modification authority even allowed the shortened notice periods and single customer tariffs that the D.C. Circuit's interpretation of Section 203(b)(2) allows. *Compare Maislin*, 497 U.S. at 134 n.14 *with* pp. 24-25 & n.33, *supra*.

1978. However, any such claim is baseless. The 1990 decision in *Maislin* relied on a century of pre-1978 decisions in rejecting the ICC's negotiated rates rule. Further, Congress explicitly provided in the 1978 recodification statute itself (not just the legislative history) that the recodification "may not be construed as making a substantive change in laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 (1978).

Third, petitioners claim that *Maislin* involved a different issue from this case: "whether truckers must follow rates that have been filed," rather than whether they may be excused from filing tariffs at all. Fed. Br. 27-28; *see* MCI Br. 33. But that is wrong on both counts. First, as petitioners elsewhere admit (Fed. Br. 21; MCI Br. 23-24), the FCC Order exempts carriers from the obligation to follow their tariffs and allows them to charge rates that are lower than filed rates (as MCI has done). *See* pp. 9, 21, *supra*. Second, *Maislin* squarely held that the filing of tariffs (under § 10761) and following tariffs (under § 10762) are each "utterly central" to the administration of the Act. 497 U.S. at 132. The reality is that risks of the discrimination and unlawful rates that the Act is designed to prevent are exacerbated if a carrier files no rates, rather than selectively departs from those rates that it does file.

III. CONGRESS HAS RATIFIED THE D.C. CIRCUIT'S INTERPRETATION OF THE ACT AND IT IS TO CONGRESS THAT PETITIONERS MUST TURN.

Finally, despite the clear terms of Section 203 and the prior holdings that Section 203 imposes mandatory rate filing obligations that the FCC cannot waive, petitioners have offered elaborate arguments that Congress has acquiesced in the FCC's permissive detariffing rules. However, their own contentions show that Congress has, to the contrary, ratified the D.C. Circuit's and the Second Circuit's interpretation.

This much follows from the FCC's final attempt to distinguish *Maislin*. The FCC notes that "the Court in *Maislin* had relied on the amendment of the Interstate Commerce Act that had allowed

the ICC 'to exempt motor *contract* carriers from the requirements that they adhere to published tariffs' " and that the Court stated that this " 'demonstrat[es] that Congress is aware of the requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers.' " Fed. Br. 29 (quoting *Maislin*, 497 U.S. at 135). But the FCC ignores that the D.C. Circuit's decision in this case has been similarly ratified.

In particular, as the FCC admits (Fed. Br. 26-27), petitioners and others responded to the D.C. Circuit's 1992 and 1993 decisions by proposing a series of amendments to the Communications Act. These ranged from proposals to give the FCC explicit authority to exempt nondominant carriers from rate filing requirements (*e.g.*, S. 1086, 103d Cong., 1st Sess., § 5, p. 13) to proposals that the FCC be allowed to exempt specific classes of carriers. As the FCC also admits, "Congress" responded by "stat-[ing] that it 'was aware . . . of the D.C. Circuit's' " decision, and by authorizing an exemption to statutory filed rate requirements only for one class of carriers: "mobile carriers." *See* Fed. Br. 26-27. As in *Maislin*, this establishes that Congress "has deliberately chosen not to disturb the [statutory rate filing obligation] with respect to [other] carriers." *Maislin*, 497 U.S. at 135.[52]

The FCC and MCI nonetheless also argue that Congress has acquiesced in the FCC's earlier permissive detariffing rule either by its silence or by enacting the Telephone Operator Consumer Services Improvement Act of 1991 ("TOCSIA"). This claim is baseless. "The doctrine of legislative acquiescence is at best only

[52]The FCC seeks to rely on this amendment by claiming that it and "the Commission's permissive detariffing policy are harmonious" and that the amendment "hardly shows congressional hostility toward the [FCC's] permissive detariffing policy." Fed. Br. 27. But *Maislin* rejected this precise argument in holding that vague emanations from the Motor Carrier Act of 1980 could not permit exceptions to the filed rate requirements:

> "[The FCC has] pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding . . . construction; harmony with the general legislative purpose is inadequate for that formidable task."

Maislin, 497 U.S. at 135 (quoting *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. at 420).

an auxiliary tool for use in interpreting ambiguous statutory provisions." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947). Here, the statute—Section 203—is unambiguous, and Congress cannot silently "acquiesce" in an interpretation contrary to the statute's plain meaning. *Arkansas Best Corp.* v. *Commissioner*, 485 U.S. 212, 222 n.7 (1988); *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978); *TVA* v. *Hill*, 437 U.S. 153, 173 (1978).

Further, throughout the period at issue, the only authoritative pronouncements in which Congress might have acquiesced were to the effect that filed rate requirements were mandatory and could not be, and had not been, waived by the FCC. The uniform existing judicial interpretation of Section 203 (the D.C. Circuit's 1985 and the Second Circuit's 1973 and 1978 decisions) held that the rate filing requirements were mandatory. Further, the FCC had then appeared to acquiesce in those decisions by characterizing its permissive detariffing rules as a statement of its enforcement policies that did not alter any carrier's "unalterable" duty under the statute. *See* pp. 7-8, *supra*. Indeed, while individual members of Congress were told (generally and in unrelated contexts) that the FCC was not engaged in economic regulation of nondominant carriers, they were never told that the FCC had purported to *remove* rate filing obligations. *Compare* Fed. Br. 23 & MCI Br. 27 n.27.

In any case, TOCSIA disclaims any intent or effect of changing the meaning of Section 203. It was enacted to address widespread complaints associated with a narrow segment of the industry (*viz.*, operator service providers). It thus specifically provides—in a section entitled "[s]tatutory construction" that neither the FCC nor MCI even mentions—that "[n]othing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter." 47 U.S.C. § 226(i). Because Section 203 is one of the "other sections of this chapter," TOCSIA cannot be read to alter the historic understanding of that section's mandatory rate filing requirements. Further, contrary to the FCC's tortured arguments

(Br. 22-26), TOCSIA's provisions are entirely consistent with the obligation of all common carriers to file tariffs.[53]

Finally, while the acquiescence arguments are meritless, petitioners are correct in looking to Congress for changes in the law. As this Court concluded in *Maislin*, if rate filing requirements no longer serve a valid purpose, "it is the responsibility of Congress to modify or eliminate these sections." *Maislin*, 497 U.S. at 136. That has been this Court's consistent teaching in this area, and Congress for its part has repeatedly shown that it is fully capable of legislating in the area, both to allow exemptions where appropriate[54] and to alter procedures and practices while reaffirming the core filed rate requirements.[55] Thus, "[i]f there is to be an overruling of the [filed rate requirements], it must come from Congress." *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986).

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[53]TOCSIA requires the filing of *additional* information that goes beyond that required by Section 203 (*e.g.*, amounts of commissions and estimates of traffic volumes) as well as rate information. *See* 47 U.S.C. § 226(h)(1). Thus, those common carriers that provide operator service (which include AT&T as well as many "nondominant" carriers) must file tariffs containing both the information required by Section 203 and the additional information required by TOCSIA while that statute remains in effect. TOCSIA also imposes filing obligations on providers of operator services that are not carriers and that are thus today not subject to Section 203 (*see id.* § 226(a)(9)), such that these noncarriers will make filings of only the information required by TOCSIA.

[54]*See, e.g.*, 47 U.S.C. § 332(c)(1)(A) (authorizing FCC to grant exemptions for commercial mobile carriers); 49 U.S.C. §§ 10761(b), 10762(f) (authorizing ICC to grant exemptions for motor contract carriers); Airline Deregulation Act of 1978, Pub. L. 95-504, § 31, 92 Stat. 1731-32 (amending 49 U.S.C. § 1386(b) to authorize CAB to grant exemptions from rate filing requirements).

[55]*See, e.g.*, Negotiated Rates Act of 1993, Pub. L. No. 103-180, § 2, 107 Stat. 2044 (reaffirming filed rate doctrine after *Maislin*, but amending law with regard to undercharge claims asserted by bankrupt carriers).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

EXCERPTS FROM THE COMMUNICATIONS ACT OF 1934, AS AMENDED

47 U.S.C. § 201

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such

common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 202

§ 202. Discrimination and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 203

§ 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate,

file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication

unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 204

§ 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 12 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective, or within 15 months after such date if the hearing raises questions of fact of such extraordinary complexity that the questions cannot be resolved within 12 months.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

47 U.S.C. § 205

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order

that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

47 U.S.C. § 210

§ 210. Franks and passes; free service to governmental agencies in connection with national defense

(a) Nothing in this chapter or in any other provision of law shall be construed to prohibit common carriers from issuing or giving franks to, or exchanging franks with each other for the use of, their officers, agents, employees, and their families, or, subject to such rules as the Commission may prescribe, from issuing, giving, or exchanging franks and passes to or with other common carriers not subject to the provisions of this chapter, for the use of their officers, agents, employees, and their families. The term "employees", as used in this section, shall include furloughed, pensioned, and superannuated employees.

(b) Nothing in this chapter or in any other provision of law shall be construed to prohibit common carriers from rendering to any agency of the Government free service in connection with the preparation for the national defense: *Provided*, That such free service may be rendered only in accordance with such rules and regulations as the Commission may prescribe therefor.

47 U.S.C. § 211

§ 211. Contracts of carriers; filing with Commission

(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

47 U.S.C. § 226

§ 226. Telephone operator services

(a) Definitions

As used in this section—

(1) The term "access code" means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence.

(2) The term "aggregator" means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.

(3) The term "call splashing" means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location.

(4) The term "consumer" means a person initiating any interstate telephone call using operator services.

(5) The term "equal access" has the meaning given that term in Appendix B of the Modification of Final Judgment entered August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192 (United States District Court, District of Columbia), as amended by the Court in its orders issued prior to the enactment of this section.

(6) The term "equal access code" means an access code that allows the public to obtain an equal access connection to the carrier associated with that code.

(7) The term "operator services" means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than—

(A) automatic completion with billing to the telephone from which the call originated; or

(B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

(8) The term "presubscribed provider of operator services" means the interstate provider of operator services to which the consumer is connected when the consumer places a call using a provider of operator services without dialing an access code.

(9) The term "provider of operator services" means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services.

(b) Requirements for providers of operator services

(1) In general

Beginning not later than 90 days after October 17, 1990, each provider of operator services shall, at a minimum—

(A) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;

(B) permit the consumer to terminate the telephone call at no charge before the call is connected;

(C) disclose immediately to the consumer, upon request and at no charge to the consumer—

(i) a quote of its rates or charges for the call;

(ii) the methods by which such rates or charges will be collected; and

(iii) the methods by which complaints concerning such rates, charges, or collection practices will be resolved;

(D) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of subsection (c) of this section and, if applicable, subsection (e)(1) of this section;

(E) withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator (i) is blocking access by means of "950" or "800" numbers to interstate common carriers in violation of subsection (c)(1)(B) of this section or (ii) is blocking access to equal access codes in violation of rules the Commission may prescribe under subsection (e)(1) of this section;

(F) not bill for unanswered telephone calls in areas where equal access is available;

(G) not knowingly bill for unanswered telephone calls where equal access is not available;

(H) not engage in call splashing, unless the consumer requests to be transferred to another provider of operator services, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred; and

(I) except as provided in subparagraph (H), not bill for a call that does not reflect the location of the origination of the call.

(2) Additional requirements for first 3 years

In addition to meeting the requirements of paragraph (1), during the 3-year period beginning on the date that is 90 days after October 17, 1990, each presubscribed provider of operator services shall identify itself audibly and distinctly to the consumer, not only as required in paragraph (1)(A), but also for a second time before connecting the call and before the consumer incurs any charge.

(c) Requirements for aggregators

(1) In general

Each aggregator, beginning not later than 90 days after October 17, 1990, shall—

(A) post on or near the telephone instrument, in plain view of consumers—

(i) the name, address, and toll-free telephone number of the provider of operator services;

(ii) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and

(iii) the name and address of the enforcement division of the Common Carrier Bureau of the Commission, to which the consumer may direct complaints regarding operator services;

(B) ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "800" and "950" access code numbers to obtain access to the provider of operator services desired by the consumer; and

(C) ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

(2) Effect of State law or regulation

The requirements of paragraph (1)(A) shall not apply to an aggregator in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (1)(A).

(d) General rulemaking required

(1) Rulemaking proceeding

The Commission shall conduct a rulemaking proceeding pursuant to this subchapter to prescribe regulations to—

(A) protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls; and

(B) ensure that consumers have the opportunity to make informed choices in making such calls.

(2) Deadlines

The Commission shall initiate the proceeding required under paragraph (1) within 60 days after October 17, 1990, and shall prescribe regulations pursuant to the proceeding not later than 210 days after October 17, 1990. Such regulations shall take effect not later than 45 days after the date the regulations are prescribed.

(3) Contents of regulations

The regulations prescribed under this section shall—

(A) contain provisions to implement each of the requirements of this section, other than the requirements established by the rulemaking under subsection (e) of this section on access and compensation; and

(B) contain such other provisions as the Commission determines necessary to carry out this section and the purposes and policies of this section.

(4) Additional requirements to be implemented by regulations

The regulations prescribed under this section shall, at a minimum—

(A) establish minimum standards for providers of operator services and aggregators to use in the routing and handling of emergency telephone calls; and

(B) establish a policy for requiring providers of operator services to make public information about recent changes in operator services and choices available to consumers in that market.

(e) Separate rulemaking on access and compensation

(1) Access

The Commission, within 9 months after October 17, 1990, shall require—

(A) that each aggregator ensure within a reasonable time that each of its telephones presubscribed to a provider of operator services allows the consumer to obtain access to the provider of operator services desired by the consumer through the use of an equal access code; or

(B) that all providers of operator services, within a reasonable time, make available to their customers a "950" or "800" access code number for use in making operator services calls from anywhere in the United States; or

(C) that the requirements described under both subparagraphs (A) and (B) apply.

(2) Compensation

The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones. Within 9 months after October 17, 1990, the Commission shall reach a final decision on whether to prescribe such compensation.

(f) Technological capability of equipment

Any equipment and software manufactured or imported more than 18 months after October 17, 1990, and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes.

(g) Fraud

In any proceeding to carry out the provisions of this section, the Commission shall require such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud.

(h) Determinations of rate compliance

(1) Filing of informational tariff

(A) In general

Each provider of operator services shall file, within 90 days after October 17, 1990, and shall maintain, update regularly, and keep open for public inspection, an informational tariff specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided. Any changes in such rates, terms, or conditions shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect.

(B) Waiver authority

The Commission may, after 4 years following October 17, 1990, waive the requirements of this paragraph only if—

(i) the findings and conclusions of the Commission in the final report issued under paragraph (3)(B)(iii) state that the regulatory objectives specified in subsection (d)(1)(A) and (B) of this section have been achieved; and

(ii) the Commission determines that such waiver will not adversely affect the continued achievement of such regulatory objectives.

(2) Review of informational tariffs

If the rates and charges filed by any provider of operator services under paragraph (1) appear upon review by the Commission to be unjust or unreasonable, the Commission may require such provider of operator services to do either or both of the following:

(A) demonstrate that its rates and charges are just and reasonable, and

(B) announce that its rates are available on request at the beginning of each call.

(3) Proceeding required

(A) In general

Within 60 days after October 17, 1990, the Commission shall initiate a proceeding to determine whether the regulatory objectives specified in subsection (d)(1)(A) and (B) of this section are being achieved. The proceeding shall—

(i) monitor operator service rates;

(ii) determine the extent to which offerings made by providers of operator services are improvements, in terms of service quality, price, innovation, and other factors, over those available before the entry of new providers of operator services into the market;

(iii) report on (in the aggregate and by individual provider) operator service rates, incidence of service complaints, and service offerings;

(iv) consider the effect that commissions and surcharges, billing and validation costs, and other costs of doing business have on the overall rates charged to consumers; and

(v) monitor compliance with the provisions of this section, including the periodic placement of telephone calls from aggregator locations.

(B) Reports

(i) The Commission shall, during the pendency of such proceeding and not later than 5 months after its

commencement, provide the Congress with an interim report on the Commission's activities and progress to date.

(ii) Not later than 11 months after the commencement of such proceeding, the Commission shall report to the Congress on its interim findings as a result of the proceeding.

(iii) Not later than 23 months after the commencement of such proceeding, the Commission shall submit a final report to the Congress on its findings and conclusions.

(4) Implementing regulations

(A) In general

Unless the Commission makes the determination described in subparagraph (B), the Commission shall, within 180 days after submission of the report required under paragraph (3)(B)(iii), complete a rulemaking proceeding pursuant to this subchapter to establish regulations for implementing the requirements of this subchapter (and paragraphs (1) and (2) of this subsection) that rates and charges for operator services be just and reasonable. Such regulations shall include limitations on the amount of commissions or any other compensation given to aggregators by providers of operator service.

(B) Limitation

The requirement of subparagraph (A) shall not apply if, on the basis of the proceeding under paragraph (3)(A), the Commission makes (and includes in the report required by paragraph (3)(B)(iii)) a factual determination that market forces are securing rates and charges that are just and reasonable, as evidenced by rate levels, costs, complaints, service quality, and other relevant factors.

(i) Statutory construction

Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter.

47 U.S.C. § 332

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and market-place demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not

there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to the enactment of the Omnibus Budget Reconciliation Act of 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition con-

tained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communica-

tions Satellite Act of 1962 [47 U.S.C. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153(n) of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153(n) of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

EXCERPTS FROM SECTION 6 OF THE INTERSTATE COMMERCE ACT AS IT STOOD IN 1934

49 U.S.C. § 6(1), 6(3), 6(7) (1934)

§ 6. Schedules and statements of rates, etc., joint rail and water transportation.

(1) Schedule of rates, fares, and charges; filing and posting.

Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such

aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

* * * *

(3) Change in rates, fares, etc.; notice required; simplification of schedules.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without

filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

* * * *

(7) Transportation without filing and publishing rates forbidden; rebates; privileges.

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

EXCERPTS FROM THE INTERSTATE COMMERCE ACT AS RECODIFIED IN 1978

49 U.S.C. § 10761

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect

under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.

49 U.S.C. § 10762

§ 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one

year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a household goods freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, and IV of that chapter, respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly—

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter III or IV of that chapter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(2) A joint tariff filed by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter shall identify the carriers that are parties to it. The carriers that are parties to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff. The Commission may prescribe or approve what constitutes a concurrence or acceptance.

(c)(1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

(2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate or the value of service under the rate, the carrier shall publish, file, and keep open for public inspection a notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. In the case of a carrier other than a rail carrier and motor common carrier of passengers with respect to special or charter transportation, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not

become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title shall become effective in accordance with the provisions of such section. In the case of a motor common carrier of passengers, a proposed rate change resulting in an increased rate or a new rate applicable to special or charter transportation shall not become effective for 30 days after the notice is published, and a proposed rate change resulting in a reduced rate applicable to special or charter transportation shall not become effective for 10 days after the notice is published.

(d)(1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

(2) The Commission may prescribe regulations for the simplification of tariffs by carriers providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title and permit them to change rates, classifications, rules, and practices without filing complete tariffs that cover matter that is not being changed when the Commission finds that action to be consistent with the public interest. Those carriers may publish new tariffs that incorporate changes or plainly indicate the proposed changes in the tariffs then in effect and kept open for public inspection. However, the Commission shall require that all rates of rail carriers and rail rate-making associations be incorporated in their individual tariffs by the end of the 2d year after initial publication of the rate, or by the end of the 2d year after a change in a rate becomes effective, whichever is later. The Commission may extend those periods if cause exists, but if it does, it must send a notice of the extension and a statement of the reasons for the extension to Congress. A rate not incorporated in an individual tariff as required by the Commission is void.

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

(f) The Commission may grant relief from this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(g) The Commission shall streamline and simplify, to the maximum extent practicable, the filing requirements applicable under this section to motor common carriers of property with respect to transportation provided under certificates to which the provisions of section 10922(b)(4)(E) of this title apply and to motor contract carriers of property with respect to transportation provided under permits to which the provisions of section 10923(b)(5) of this title apply.

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Nos. 93-356 and 93-521

In the Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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1. *AT&T reads "any" out of Section 203(b)(2).* Section 203(a) of the Communications Act requires telephone companies to file tariffs, but Section 203(b)(2) authorizes the FCC to "modify any requirement" of Section 203. AT&T nevertheless contends that the FCC lacks authority to alter the tariff-filing requirement. AT&T has failed to explain how its contention may be

reconciled with the language of the statute since, under its construction of Section 203(b)(2), the FCC may not modify "any" requirement of Section 203.

AT&T states (Br. 24) that, "[c]ontrary to the FCC's claim," AT&T's reading of the statute "give[s] full effect to Section 203(b)(2)'s provision that the FCC may 'modify *any* requirement of [Section 203].'" However, almost immediately after recognizing that the statute authorizes the Commission to modify *any* requirement of Section 203, AT&T states (Br. 25) that the FCC may *not* "exempt carriers from the requirements that they publish and file 'all' their rates, and charge only those rates that have been filed." In fact, under AT&T's interpretation of Section 203(b)(2), all the FCC may do is modify matters such as "the form and content of rate schedules" and "the jurisdiction where [tariffs] are filed." Br. 24.[1] In short, under AT&T's construction of Section 203(b)(2), the Commission may not modify the requirement that long distance telephone companies file tariffs. AT&T's proposed construction therefore reads "any" out of the statute.

2. *The analogous provision of the Interstate Commerce Act supports the FCC's construction of the Communications Act.* AT&T's failure to give effect to the word "any" also infects its discussion of the Interstate Commerce Act. That Act does not authorize, and has never authorized, the ICC to modify "any" requirement

[1] Although AT&T suggests in this Court (Br. 24) that the Commission has significant flexibility with regard to tariffs under its reading of Section 203(b)(2), AT&T simultaneously has argued in the D.C. Circuit that the Commission may not authorize non-dominant carriers to file tariffs specifying a "range of rates." Joint Br. of Petitioners AT&T *et al.* at 17-32, *Southwestern Bell Corp.* v. *FCC*, appeal pending, No. 93-1562 (to be argued May 20, 1994).

of the analogous provisions of the Interstate Commerce Act. Rather, 49 U.S.C. 10762(d)(1) authorizes the ICC to "change the other requirements of this section." While that language would be susceptible to a broad interpretation, it is not as broad as the language of the Communications Act since the ICC is not authorized to modify "any" requirement. Thus, whatever the extent of the ICC's modification authority, the FCC has greater authority.

AT&T's discussion of the history of the analogous ICC provision (Br. 25-29) does not support its narrow construction of Section 203(b)(2) of the Communications Act, but instead supports our construction of that provision. The analogous provision of the Interstate Commerce Act (former 49 U.S.C. 6(3) (1976)) authorized the ICC to "modify the requirements of this section in respect to publishing, posting, and filing of tariffs." In 1978, Congress amended the Interstate Commerce Act to provide that the ICC may "change the other requirements of this section." At that time, Congress said that it was not "making a substantive change" in the Interstate Commerce Act. Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466. Contrary to the conclusion AT&T draws from that history, it shows that Congress did not view "modify" as having a restricted meaning. Congress replaced "modify" with "change" in 1978, and said that it was not altering the substance of the Interstate Commerce Act. If Section 203(b)(2) of the Communications Act provided that the FCC may "change any requirement" of Section 203, there would be no basis at all for the D.C. Circuit's conclusion that the FCC's authority should be limited to making "circumscribed alterations." 93-356 Pet. App. 53a, quoting *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985). Yet Congress in 1978 apparently did not think

"modify" meant "to make minor changes in" (*Webster's Ninth New Collegiate Dictionary* 763 (1986)), since it considered "modify" to be the equivalent of "change." Thus, contrary to AT&T's contention, the 1978 amendment to the Interstate Commerce Act supports our conclusion that "modify" should be given the alternative meaning provided in *Webster's*—"to make basic or fundamental changes in often to give a new orientation to or to serve a new end." *Ibid.*

3. *"Modify" encompasses either minor or fundamental changes.* AT&T erroneously states (Br. 17) that we "concede that the ordinary meaning of 'modify' is * * * 'make minor changes in.'" We make no such concession. Rather, we acknowledge that "modify," standing alone, may have either meaning given in *Webster's*, but when read with the word "any," "modify" should be given the broader meaning in Section 203(b)(2). That is, if relieving some telephone companies of the requirement that they file tariffs is not thought to be a minor change, then the FCC is authorized to make major changes since the Commission may alter "any" requirement of Section 203.

AT&T also challenges (Br. 17) our reliance on *Webster's Ninth New Collegiate Dictionary*. Twice last Term, however, this Court relied on that dictionary to elucidate the meaning of an ambiguous term. *Good Samaritan Hospital* v. *Shalala*, 113 S. Ct. 2151, 2158 (1993); *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 113 S. Ct. 1489, 1494-1495 (1993). Moreover, other dictionaries provide similarly broad definitions. One of the definitions of "modify" in *Webster's Third New International Dictionary* 1452 (1986) is "to make a basic or important change in; alter." This Court has relied on that dictionary even more recently than on *Webster's Ninth New Collegiate Dictionary*. *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798, 804 (1994). Other commonly used dictionaries are more general. For example, *The American Heritage Dictionary of the English Language* 1161 (3d ed. 1992) defines "modify" as "[t]o change in form or character; alter." The Commission's interpretation is entirely consistent with that definition, which does not specify the extent of the change or alteration.

Contrary to AT&T's apparent suggestion (Br. 18), there is no basis on which to conclude that "modify" has changed in meaning since 1934. The dictionaries from the 1930s that AT&T cites define "modify" as meaning "[t]o change somewhat in form or qualities." AT&T Br. 18 n.22. That shows that "modify" means to "change," which, as we have explained, supports our construction of the statute. That conclusion is not altered by the fact that the definitions from the 1930s say to change *somewhat*. That begs the question, since "somewhat" means "in some degree or measure." *Webster's Ninth New Collegiate Dictionary* 1124 (1986). Thus, the amount of "change" resulting from a modification, under the definitions from the 1930s that AT&T cites, is indefinite. The Ninth edition of *Webster's* merely elaborates on the definitions that were common in the 1930s by stating that the change may be either fundamental or minor.

Nor is there merit to AT&T's claim (Br. 19) that Congress would have used the word "exempt" rather than "modify" if it had meant to authorize the FCC to allow telephone companies lacking market power to offer service without filing tariffs. The modification power under Section 203(b)(2) applies to each of the requirements of Section 203, and "modify" better fits all of the provisions of Section 203 than would "exempt." In particular, by giving the Commission authority to "modify" the requirements of Section 203, Congress granted the power to increase the extent of regulation as well as the

power to exempt companies from regulation. "Modify" is thus a more appropriate word for granting the FCC broad authority to adjust the requirements of Section 203.

AT&T also errs by claiming (Br. 26-27) that its reading of "modify" finds support in the Motor Carrier Act of 1935. Motor common carriers were governed by former 49 U.S.C. 317 (1976): former Section 317(a) required common carriers to file tariffs, former Section 317(b) required common carriers to follow the tariffs they had filed, and former Section 317(c) authorized the ICC to "modify the requirements of this section." Former 49 U.S.C. 318 (1976), which governed motor contract carriers, was drafted differently in many respects. Former Section 318(a) first established a tariff-filing requirement that was followed by a long proviso stating, among many other qualifications, that the ICC was authorized to "modify the requirements of this paragraph." Former Section 318(a) then set out the requirement that contract carriers must follow the tariffs they file, followed by a proviso authorizing contract carriers to "apply to the Commission for relief from the provisions of this paragraph." Contrary to AT&T's claim (Br. 27), this is not a "legislative recognition that the 'modification' authority does not allow exemptions from rate filing requirements." Both former Section 317 and former Section 318 authorized the ICC to "modify" the tariff-filing requirements they established.[2]

[2] Nor is AT&T's position supported by 49 U.S.C. App. 1386(b)(1), which authorized the Civil Aeronautics Board (CAB) to "exempt from the requirements of this subchapter * * * any person or class of persons." AT&T claims (Br. 27 n.39) that Section 1386(b)(1) shows that Congress thought that the CAB's authority to modify the tariff-filing requirement was "insufficient to accomplish detariffing." But the authority to modify the tariff-filing requirement was set out in former 49 U.S.C. 1373(c) (1976), and Section 1386(b)(1) reached far more than that Section—it authorized exemptions from "this subchapter." Section 1386(b)(1) accordingly sheds little light on the interpretation of former Section 1373(c). It says nothing about the meaning of "modify" in Section 203(b)(2) of the Communications Act.

AT&T has failed to respond to our argument (opening brief at 19-20) that the FCC's permissive detariffing policy, as applied, is a modification of the tariff-filing requirement even if "modify" is construed narrowly. The FCC has hardly abolished the tariff-filing requirement, which still applies to all international carriers, to almost all local exchange carriers providing interstate access services, and to AT&T, which has 60 percent of the domestic long distance market. The Commission has lifted the obligation to file tariffs in a portion (40 percent) of one of three markets. Even in that portion, some carriers desire to file tariffs in some circumstances, as demonstrated by MCI's opposition to the Commission's "mandatory detariffing" policy. See *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985). If "modify" is given a limited reading, the statute nonetheless allows the FCC to take the limited step of partial detariffing.

4. *Section 203(c) shows that Congress contemplated modification of the tariff-filing requirement.* As stated in our opening brief (at 20-22), the Commission's reading of the statute is supported by Section 203(c), which provides that, "unless otherwise provided by or under authority of this chapter," no carrier shall provide service "unless schedules have been filed." That shows that the Commission has "authority" to relieve telephone companies of the requirement that they file "schedules." AT&T has advanced no reason why Section 203(c) should

not be read to refer to Section 203(b)(2), which in our view authorizes the Commission to modify Section 203(a)'s requirement that telephone companies file "schedules showing all charges."

AT&T merely lists (Br. 20 n.26) four other provisions that were enacted in 1934 that arguably authorize untariffed service. Two of those provisions (47 U.S.C. 201(b) and 211) refer to "contracts" that must be filed rather than "schedules" or "tariffs" that must be filed. Another provision (47 U.S.C. 205 (1988 & Supp. III 1991)) provides that the Commission may prescribe rates if it determines that a carrier's rates are unreasonable. The final provision (47 U.S.C. 210) merely allows telephone companies to provide free service to employees. The proviso in Section 203(c) contemplating service in the absence of a tariff where detariffed service has been authorized by the Commission is much more clearly a reference to Section 203(b)(2) than to any of the provisions AT&T cites.

5. *AT&T's interpretation of the statute is not compelled by other provisions of the Communications Act.* AT&T contends (Br. 21) that "the FCC is nullifying" 47 U.S.C. 204, which authorizes the suspension of a filed rate before it takes effect, and 47 U.S.C. 415, the limitation of actions provision. That is not so. Those provisions are in effect and apply to the many carriers that must file tariffs or choose to do so. Of course, Sections 204 and 415 would not apply to non-dominant carriers that choose not to file tariffs under the permissive detariffing policy. But it is hardly surprising that a modification of one statutory provision has effects on other provisions.

Contrary to AT&T's assertion (Br. 21), the permissive detariffing policy does not "authoriz[e] the discrimination and preferences that are barred" by 47 U.S.C. 202(a).

Rather, the Commission has made clear that those provisions continue to apply to all carriers, whether or not they are required to file tariffs. *Report and Order*, 7 F.C.C. Rcd. 8072, 8079 (1992). At the same time, the Commission determined that, because of their lack of market power, telephone companies subject to competition are unlikely to be able to discriminate unreasonably in violation of Section 202(a). See *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308, 334-338 (1979). AT&T's claim that tariffs are essential to proving discrimination claims is contrary to experience in, for example, cases arising in the employment discrimination context. Employers do not publish tariffs describing all of their hiring decisions in detail, but plaintiffs nevertheless bring suit and, through discovery, develop evidence to support their claims. If there is reason to think that a telephone company is discriminating unreasonably, a plaintiff may bring a comparable action in the absence of tariffs.

AT&T's prior position on this point—which goes to the reasonableness of the policy rather than to the statutory construction issue—is more accurate than its current position. In 1985, the Commission noted that AT&T had stated that the assertion "that the continued filing of tariffs will aid in the prevention of anti-competitive price discrimination was without merit and demonstrated a fundamental misunderstanding of the competitive process." *Sixth Report and Order*, 99 F.C.C.2d 1020, 1027, vacated and remanded, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). The Commission agreed with AT&T and added: "The simple answer to this contention, AT&T asserted, is that a non-dominant carrier, by definition does not have 'sufficient market power to be able to engage in improper price

discrimination without suffering the discipline of the marketplace.'" *Ibid.*, quoting AT&T comments.

Congress agrees that the tariff-filing requirement is not necessary to implement the prohibitions on unreasonable and discriminatory rates. In 47 U.S.C. 332(c)(1)(A), as amended in 1993 (see Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b)(2)(A)(iii), 107 Stat. 393), Congress authorized the Commission to relieve commercial mobile carriers from the tariff-filing requirement, while simultaneously prohibiting the Commission from relieving such carriers from the requirement that rates be reasonable and nondiscriminatory. See also H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993).

6. *AT&T's reliance on Maislin is misplaced.* AT&T argues at length (Br. 29-41) that the permissive detariffing rule conflicts with the "filed rate doctrine," as applied in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). AT&T errs, largely for reasons already discussed. It claims that the language of Section 203(b)(2) was taken "virtually verbatim" from former Section 6(3) of the Interstate Commerce Act (Br. 38), that we "have not identified—and cannot identify—a single difference that is relevant to the issue before the Court" (Br. 39), and that "the rate filing provisions of the ICA were identical in all material respects to those of the Communications Act *prior* to 1978" (Br. 40). To the contrary, Section 203(b)(2) authorizes the FCC to modify "any" requirement of Section 203, and the analogous provision of the Interstate Commerce Act does not authorize, and never has authorized, the modification of "any" requirement.[3] As we have explained, AT&T's position—that the Commission may not modify the tariff-filing requirement—cannot be squared with the language Congress enacted in the Communications Act.

[3] The Second Circuit, referring explicitly to the FCC's authority under Section 203(b)(2), has held that "the congressional intent was not to provide a carbon copy of the Interstate Commerce Act." *AT&T* v. *FCC*, 503 F.2d 612, 616 (1974).

In addition, AT&T's reliance on *Maislin* and on the similarities between the two statutes is misplaced because, as amended in 1978, the Interstate Commerce Act plainly does not authorize the ICC to "modify" the requirement that carriers follow the rates they have filed. That is because the modification provision in the Interstate Commerce Act authorizes changes in the requirements of "this section" (49 U.S.C. 10762(d)(1)), and the requirement that carriers follow their filed tariffs is in a different section (49 U.S.C. 10761(a)). Accordingly, the provision of the Interstate Commerce Act that is analogous to Section 203(b)(2) was not at issue in *Maislin*. For that reason as well, *Maislin* is not instructive with respect to the proper construction of Section 203(b)(2).

AT&T also suggests (Br. 31-32) that the introduction of competition into the telephone industry does not constitute "special circumstances" under Section 203(b)(2), a position not adopted by the court of appeals. AT&T overlooks the purposes served by the permissive detariffing rule. As explained in our opening brief (at 30-34), the Commission concluded that the burdens caused by tariffs posed special problems for challengers to AT&T's long distance monopoly. The FCC instituted the permissive detariffing rule to give new entrants an incentive to offer discounts, since they would have little incentive to cut prices if AT&T, long the dominant long distance carrier, could quickly learn of the discounts by inspecting tariffs and then match them. *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 453-454 (1981). Permis-

sive detariffing thus addresses the special market problems presented when a long-dominant company faces competition from many smaller companies.

Furthermore, AT&T's entire discussion of the filed rate doctrine—which, in our view, is not even implicated in this case[4]—appears to be premised on the theory that it is a free-floating rule of constitutional proportion, rather than a rule developed in the context of the transportation industry. But all of the precedent on which AT&T relies developed under the Interstate Commerce Act, not the Communications Act. It should not be imported indiscriminately into this different statutory, regulatory, and economic context to strike down a sensible policy that is authorized by the terms of the Communications Act.

At the same time, AT&T errs insofar as it suggests (see, *e.g.*, Br. 35) that the tariff-filing requirement is the central provision of the Communications Act. To the contrary, whether rates are filed is not an end in itself, but merely a means to the end of ensuring reasonable, non-discriminatory rates. That is evident both as a matter of common sense and from the structure of the statute. In the statute, the substantive requirements come first—47 U.S.C. 201(a) requires telephone companies to provide service "upon reasonable request" and Section 202(a) prohibits "unreasonable discrimination." The Commission lacks authority to modify those provisions. The substantive provisions are followed by the tools for their implementation, including the tariff-filing requirement of Section 203(a) and the authority granted

[4] The classic statement of the filed rate doctrine is: "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext." *Louisville & N.R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915).

under Section 204(a)(1), which provides that the Commission "may" investigate and "may" suspend rates. Congress gave the Commission broad discretion with respect to the tools—the Commission may "modify any requirement" of Section 203 and has unreviewable discretion with respect to whether to investigate and suspend rates under Section 204. See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979).

7. *Congress has accepted permissive detariffing as a premise of subsequent legislation.* As explained in more detail in our opening brief (at 22-26), Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) in order to require that tariffs be filed by telephone companies offering "alternative operator services" to hotels and other institutions. The amendment was needed because Congress had determined that some companies were "tak[ing] advantage of the customer's captive status" (S. Rep. No. 439, 101st Cong., 2d Sess. 2 (1990)), and Congress understood that the companies did not have to file tariffs on account of the Commission's permissive detariffing policy (*id.* at 3 & n.10). The tariffs required by TOCSIA are meant to be less burdensome than those generally required under Section 203(a) (*id.* at 23), although they would require some additional information beyond that provided by tariffs filed under Section 203(a) (see AT&T Br. in Opp. 18 n.16). In its brief on the merits, AT&T makes clear (Br. 44 n.53) that, under its reading of the Communications Act, providers of alternative operator services must file tariffs satisfying both Section 203(a) and TOCSIA. In other words, TOCSIA did not have the effect Congress intended—requiring alternative operator service providers to file streamlined tariffs—but instead imposed more burdensome requirements on those providers. Moreover, under AT&T's view, if the Commission waives

the requirement that providers of alternative operator services file tariffs, as it is expressly authorized to do (see 47 U.S.C. 226(h)(1)(B) (Supp. III 1991)), the result is that the operator service providers still would be required to file tariffs. That is neither what Congress understood nor what it intended.

Nor is there merit to AT&T's interpretation (Br. 42) of the 1993 amendment of 47 U.S.C. 332(c)(1)(A), which concerns commercial mobile carriers (such as most providers of cellular services). While amending Section 332 as part of the Omnibus Budget Reconciliation Act of 1993, Congress, aware that the D.C. Circuit had invalidated the permissive detariffing policy (H.R. Rep. No. 111, *supra*, at 260), authorized the Commission to "specify by regulation" which provisions of Title II of the Communications Act apply to commercial mobile carriers. Pub. L. No. 103-66, § 6002(b)(2)(A)(iii), 107 Stat. 393. Thus, despite the judgment below, the FCC may relieve commercial mobile carriers from the requirements of Section 203, among other provisions. AT&T contends that this Court should read Congress's failure to go further and exempt all non-dominant carriers from the tariff-filing requirement as support for its construction of Section 203(b)(2). AT&T attempts to read far too much into the subsequent legislation, and its reading turns Congress's action on its head. Congress, in effect, overturned the D.C. Circuit's decision with respect to the narrow class of carriers it was considering. Its failure to do more should not be read as an endorsement of the D.C. Circuit's decision. At the same time, Congress's amendment of Section 332(c)(1)(A) is consistent with the Commission's interpretation of Section 203(b)(2) since Section 332(c)(1)(A) authorizes the Commission to waive numerous requirements of Title II of the Communications Act with respect to

commercial mobile carriers, not just the requirements imposed by Section 203.

8. *The FCC's construction of the Communications Act is entitled to deference.* AT&T suggests (Br. 4) that this Court should not defer to the Commission's interpretation of Section 203 because the Commission said in 1980 that "the requirement that * * * all common carriers" must file tariffs is "well established." *In re Western Union Telegraph Co.*, 75 F.C.C.2d 461, 474 (1980). That is dictum, however, since the issue in that case was whether Western Union could decide unilaterally not to file a complete tariff. Moreover, the Commission noted that "[t]he drafters of Section 203 clearly intended to give the Commission broad latitude in deciding the necessity for tariff filings." *Id.* at 474 n.9.[5] And since before the break-up of the Bell System—generations ago in terms of the development of the telecommunications industry—the Commission has consistently held that it may permit non-dominant carriers not to file tariffs.

AT&T also suggests (Br. 37) that deference to the Commission's interpretation of the Communications Act is foreclosed by this Court's interpretations of the Interstate Commerce Act. Apart from the fact that this

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[5] AT&T also relies (Br. 4-5) on statements made in a brief filed on behalf of the Commission in the Second Circuit in the late 1970s. In the opposition filed by the Solicitor General in that case, however, the government made clear that the Commission, "with deliberate caution, has not yet resolved for itself whether the Communications Act would permit nonregulation." Gov't Br. in Opp. at 6, *IBM* v. *FCC*, No. 77-1540 (filed July 1978). The Solicitor General explained on that basis that certiorari was not warranted to review whether the FCC lacked authority to forbear from regulating common carriers, since the view taken by the Second Circuit in that case was "no more than dictum, not binding on the Commission or any other party." *Id.* at 7.

Court has never considered the ICC's modification authority, there is no basis for that novel suggestion, particularly since AT&T errs in claiming that there is no relevant difference between the two statutes.

The Commission's reading of Section 203(b)(2) is the better reading, since it gives effect to all of the words of the statute, including "any." But if the Commission's construction is not compelled by the language of the statute, it is at least consistent with the language of the statute, and therefore is entitled to deference.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,
v.
AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF MCI TELECOMMUNICATIONS CORPORATION

The wisdom and importance of the FCC's permissive detariffing rule are not in dispute. Nor does AT&T challenge the FCC policy judgments supporting the rule; indeed, AT&T has elsewhere agreed that "carriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably," and has argued that tariff regulation "impedes the dynamism of a competitive market and imposes both direct and indirect costs on users."[1] Aside from dominant carriers, who must still file tariffs, no party challenged permissive detariffing before this Court or before the Commission. Consumers uniformly support it. Nor is there any dispute that the Commission will continue to enforce the prohibitions of unreasonable and discriminatory pricing contained in the Communications Act, 47 U.S.C. §§ 201, 202, against all carriers—dominant and nondominant alike.

The only question in this case is whether the Communications Act unambiguously precludes the FCC from responding to dramatic changes in the telecommunications market by modifying the traditional statutory tariff filing requirement for nondominant carriers—carriers that, in AT&T's words, "cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably." *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In answering that question, AT&T's broad-brush structural and historical analysis—which relies on cases deciding different issues under a different statute—is no substitute for careful attention to the text of the Communications Act.

The text of Section 203 makes plain that Congress did not foreclose permissive detariffing. Section 203(b)(2)

[1] Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, at 16-17 (cited in MCI's opening brief at 16 n.20).

expressly authorizes the FCC to "modify any requirement made by . . . this section." That language necessarily includes Section 203's requirement that carriers "shall . . . file" tariffs. Section 203(c) likewise makes clear that Congress contemplated untariffed service as authorized "by *or under authority of*" the Act, thus demonstrating Congress's judgment that tariffs would not invariably be necessary to ensure enforcement of the substantive prohibitions against unreasonable or discriminatory rates. Read in light of Section 203(c), Section 203(b)(2) must naturally, if not inevitably, be understood to confer on the FCC the authority to forego tariffs under appropriate conditions. The Commission's reading of Section 203 is not only permissible and thus entitled to deference, *see Chevron*—it is the most reasonable interpretation of the statutory text.

Lacking a persuasive textual argument, AT&T contends that permissive detariffing exceeds the FCC's authority because it is inconsistent with the "filed rate doctrine," which was in place when the 1934 Congress passed the Communications Act. According to AT&T, the 1934 Congress must have *assumed* the FCC would use tariffs to enforce the substantive mandates of Title II. The question here, however, is whether the 1934 Congress affirmatively *legislated* an inflexible and unyielding tariff requirement. Congress plainly did not do so. To the contrary, whatever the 1934 Congress may have assumed, the statute Congress enacted in 1934 expressly delegates to the FCC the power to determine the conditions under which tariffs are not needed. That delegation is entirely consistent with Congress's general effort in 1934 to create "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).[2]

[2] *Pottsville* involved 47 U.S.C. § 154(j), which applies to Title II as well as Title III of the Act.

Deference to the FCC's exercise of delegated authority is plainly warranted in this case. Where, as here, dramatic and unforeseen changes in the competitive structure of a regulated industry render prior enforcement methods counterproductive, agencies must be given the leeway to adapt their methods to new conditions, so long as Congress has not expressly foreclosed the agency's choice. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968). Such deference is all the more appropriate here because Congress has repeatedly *ratified* the permissive detariffing rule, and enacted legislation that makes sense only in the context of permissive detariffing.

A. The Text of the Communications Act Supports the FCC's Authority to Modify the Tariff Requirement.

1. The linchpin of AT&T's textual argument is that "modify" does not mean "eliminate," and should be construed to allow only "circumscribed alterations" to the "time, form, content or place of required rate filings." AT&T Br. at 17, 19, 11. But Section 203(b)(2) authorizes the FCC to "modify *any requirement* made by or under the authority of" Section 203. In applying to "any requirement," Section 203(b)(2) authorizes the FCC to "modify" Section 203's basic requirement that carriers "shall . . . file" tariffs, § 203(a), and provide service only at tariffed rates, § 203(c). The FCC modified that requirement by making it *conditional*, applicable to carriers only in certain specified circumstances (where the carrier has market power).

As a matter of ordinary usage, it is as much a "modification" of a requirement to change the conditions under which it applies (*when* something must be done) as to change the specific duties imposed when it does apply (*what* must be done). The Commission's interpretation of "modify" is therefore an entirely familiar one—no different from the meaning of the term when a contract is modified to make a previously absolute duty conditional on some future event. *See Webster's New International*

Dictionary 1577 (2d ed. 1934) ("qualify"). All legal requirements take the form of "if X, then Y;" the requirement may be modified as much by altering X (the conditions) as by altering Y (the consequences).

Indeed, AT&T's reading would render Section 203(b)(2) largely superfluous: If Section 203(b)(2) did *not* authorize the FCC to qualify or condition the basic tariff filing requirement, it is unclear what function the provision would serve. Many of the "requirements" imposed by Section 203 are already subject to Commission discretion, wholly apart from the Section 203(b)(2) "modification" authority.[3] Similarly, no "modification" authority would be needed for the Commission to give more concrete definition to the required content of a required tariff—Section 203(a) requires filing of "all charges," specifically including "the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a).

What remains, then, are (1) a 120-day notice requirement for tariff changes (§ 203(b)(1)); (2) the basic requirement (at issue here) of filing a tariff before offering service (§ 203(a); first clause of § 203(c)); and (3) the requirement to follow a tariff once filed (second clause of § 203(c)). It hardly seems likely that *both of* the latter two requirements are excluded from a provision permitting the FCC to "modify *any* requirement" under "this section." If that view were right, Section 203(b)(2) could as readily have been written to authorize modification only of the 120-day notice rule or, at most, of the requirements of "this *sub*section." The broader language of Section 203(b)(2) strongly supports the reading the FCC attributes to it.

2. The text of Section 203(c) also powerfully supports the FCC's reading of the statute. Having said in

[3] For example, the "other information," printing, and public posting requirements of Section 203(a), and the notice-of-change requirements of Section 203(b), are expressly limited to such requirements as the Commission may prescribe.

Section 203(a) that carriers shall file tariffs, then provided in Section 203(b) both for changes in tariffs and for Commission modification of requirements under the section, Congress specifically said in Section 203(c) that no carrier may offer service except under tariff—"*unless otherwise provided by or under authority of this chapter.*" This language makes clear that Congress contemplated untariffed service, and thus directly undermines AT&T's argument that the requirement to file a tariff is an unalterable demand of the Communications Act.

Forced to concede that this clause in Section 203(c) contemplates "exemptions" from the Act's tariff filing requirements, AT&T seeks to save its construction of Section 203 by contending that untariffed service must be authorized by "other" provisions of the Act, not Section 203 itself. AT&T Br. at 20. That reading is not defensible. The reference to "this chapter" plainly *includes* Section 203; it is not limited, by its terms or otherwise, to "other provisions" of the chapter, as AT&T's argument would require. *See* AT&T Br. at 19. And it is natural, if not inescapable, to read the "unless . . . provided . . . under authority of this chapter" clause in Section 203(c) as referring specifically to the modification authority conferred in Section 203(b)(2), the immediately preceding sentence.

In any event, AT&T's argument does not explain the "or under authority of" language in Section 203(c). Congress's use of the disjunctive "or" makes clear that the Commission has been granted the authority to remove tariff requirements under certain conditions, even if the Act itself has not done so. None of the "other provisions" cited by AT&T delegates authority to the Commission to remove tariff filing requirements. *See* AT&T Br. at 20 n.26 (citing §§ 201(b), 205, 210, 211, 332(c)(1)(A)). Sections 201(b) and 211 have nothing to do with the filing of *tariffs* ("schedules," using the statutory term): They provide for FCC-created exceptions to the require-

ment that *contracts between carriers* ("contracts, agreements, or arrangements") generally be filed (47 U.S.C. §§ 201, 211(a)). Section 210 does not authorize the Commission to remove tariff requirements for any service. Likewise, Section 205 does not authorize the FCC to permit service without a tariff: It merely allows the FCC to prescribe alternative rates if it finds a particular tariffed rate unreasonable, and FCC regulations anticipate that the carrier will file a substitute tariff incorporating the prescribed rate. *See* 47 C.F.R. § 61.69.

Even if these provisions create statutory "exemptions" from the tariff filing requirement—and they do not—none delegates "authority" to the Commission to decide whether to remove tariff requirements. Thus, these provisions cannot explain the existence of the "or under authority of" clause of Section 203(c). AT&T has not identified any other provision of the original Communications Act authorizing the Commission to remove tariff requirements.[4] Apart from Section 203(b)(2), no provision would appear to confer that power. The "under authority of" clause in Section 203(c) must, therefore, contemplate untariffed service pursuant to the Commission's exercise of its Section 203(b)(2) modification authority. If it does not, the 1934 Congress's decision to include the "or under authority of" clause in Section 203(c) would have had no meaning.

3. For these reasons, AT&T must be wrong that the power conferred by Section 203(b)(2) to "modify any requirement made by" Section 203 does not encompass the power to remove the tariff requirement. Congress contemplated that service could be provided without a tariff when authorized by the Commission, and Section 203(b)(2) is the only provision in Title II that plainly empowers the Commission to condition the tariff requirement on the existence of particular circumstances or conditions. There is thus no reason to assume that Congress intended to restrict the term "modify" to "circumscribed alterations" (*MCI Communications Corp. v. Federal Communications Comm'n*, 765 F.2d 1186, 1192 (D.C. Cir. 1985); Pet. App. 53a), rather than giving it the broader meaning of which it is capable. The narrower definition imposed by the appeals court ignores the obvious permissibility of referring to a "major" or "dramatic" modification. *E.g., Webster's Ninth New Collegiate Dictionary* 763 (1983) ("to make basic or fundamental changes in[,] often to give a new orientation to or to serve a new end").[5]

[4] AT&T also cites Section 332(c)(1)(A), but that provision was added to the Act after 1934, and thus cannot explain the meaning of the "under authority of" language enacted in 1934.

In practical as well as textual terms, moreover, the FCC's modification does not amount to an "eliminat[ion]." The FCC did not abrogate the statutory command so that it no longer can or does apply to anyone. To the contrary, the FCC's policy establishes preconditions for removal of the tariff obligation that the largest carriers,

[5] AT&T used the term in that sense in the 1982 "Modification of Final Judgment," the renowned divestiture decree. *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). That decree "modified" a 1956 decree governing AT&T by replacing it "in its entirety" with a radically new and different set of provisions. *Id.* at 226. It was AT&T that proposed the label and the procedural form of a "modified" judgment, ultimately accepted by the district court with further modifications, in putting forth this revolutionary transformation—what the district court called a "major modification" (*id.* at 144 n.51)—of the predecessor decree. *Id.* at 140-41.

MCI also notes that there are differences between the mandatory detariffing rule struck down at MCI's insistence in 1985 and the permissive detariffing rule at issue here. *See MCI Telecommunications Corp. v. Federal Communications Comm'n*, 765 F.2d 1186 (D.C. Cir. 1985). We acknowledge, however, that the interpretation of the term "modify" urged by MCI in that case was unduly narrow. Especially in light of this Court's decisions applying *Chevron*, it is clear that MCI's prior view gave insufficient deference to the FCC's interpretation. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-02 (1992); *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991).

like AT&T and the dominant Regional Bell Operating Companies, do not meet. The result is that the majority of telephone calls for the majority of customers continue to be provided under tariff. *See MCI v. FCC*, 765 F.2d at 1189. Thus, permissive detariffing in practical effect applies to a "circumscribed" portion of the market.

4. AT&T also briefly adverts to the statutory reference to "special circumstances or conditions." 47 U.S.C. § 203(b)(2).[6] AT&T Br. at 19. But that language authorizes generally applicable modifications—e.g., a reduction of the statutory notice period to forty-five days or less for *all* carriers (47 C.F.R. § 61.58); or the further reduction of the notice period to one day for nondominant carriers such as those at issue here (47 C.F.R. § 61.23). Thus, this language is no impediment to modifying a requirement for a large class of carriers.

Beyond that, the statutory reference to "circumstances" or "conditions" strikingly *supports* the view that "modify" encompasses the power to remove the tariff requirement when particular "circumstances" or "conditions" are present. Indeed, the most natural reading of this provision is that the 1934 Congress anticipated that conditions in the telecommunications market could change, and intended to give the Commission sufficiently flexible authority to respond to those changes.

Furthermore, the FCC's detariffing policy readily comes within the most sensible reading of the term "special." In the world the 1934 Congress knew, a particular market in which the Bell System monopoly was subject to substantial competition would unquestionably have been a "special circumstance[] or condition[]"—warranting invocation of the exemption authority if otherwise justified on policy grounds.[7] It would be perverse to read the

[6] The statute, in addition to allowing exemptions in "particular instances," allows exemptions "by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b)(2).

[7] Notwithstanding AT&T's efforts to cloud the issue by referring to (and misstating the thrust of) legislative history surrounding passage of the Interstate Commerce Act (AT&T Br. at 30-31), there is no question that the 1934 Congress imposed rate regulation because the "[t]elephone business is a monopoly—it is supposed to be regulated." *Preliminary Report on Communications Companies*, H.R. Rep. No. 1273, 73d Cong., 2d Sess. at xxxi (1934).

statute as demanding that such an exemption come to an end, or not be extended, if those same circumstances become more common. It is far more natural, and certainly reasonable, to read "special" as covering any relevant departure from the monopoly market structure on which the tariff scheme is premised, however common the departure.

5. Finally, the FCC's interpretation is supported by the fact that it avoids an obvious difficulty of sensible and workable line-drawing—a difficulty created by AT&T's interpretation. If only minor or "circumscribed alterations" are permitted, the Commission and (on review) the courts will be called upon to make exceedingly difficult, and ultimately arbitrary, distinctions between what modifications are permitted and what modifications are too sweeping. Such distinctions are precisely what *Chevron* teaches should be left to the expert agency.

B. The FCC's Interpretation of Section 203(b)(2) Is Consistent with the Purposes of the Communications Act.

Unable to demonstrate that the text of Section 203 forecloses the FCC's permissive detariffing rule, AT&T devotes most of its energy to arguing that permissive detariffing cannot be reconciled with Title II's regulatory framework. This argument fails.

Much of AT&T's argument simply begs the question. For example, the contention that permissive detariffing repeals the filed rate requirements of Section 203(c), *see* AT&T Br. at 21, is entirely circular. By its own terms, Section 203(c) makes clear that the filed rate requirements apply "unless otherwise provided by or under authority of this chapter." The requirements plainly do not apply when they are removed by operation of the statute itself or by an exercise of the Commission's delegated

authority. AT&T's argument that permissive detariffing effectively repeals Section 204 (which authorizes the FCC to suspend or investigate a rate before it takes effect) is similarly circular. Section 204 continues to apply whenever rates must be filed, but does not apply when rates need not be filed.[8]

Nor is there merit to AT&T's argument that permissive detariffing repeals Sections 201 and 202. Those provisions remain in full force, and all carriers are under a continuing duty to obey them. The Commission has made clear that it will investigate and enforce the provisions vigorously should violations be alleged. The Commission has simply decided that the self-enforcing pressures facing nondominant carriers, supplemented by the complaint process, will ensure widespread compliance with the Act.

Having conceded that "carriers lacking market power cannot rationally charge unjust or unreasonable rates, or discriminate unreasonably," *see* note 1 *supra,* AT&T cannot now take issue with the reasonableness of the Commission's conclusion that Sections 201 and 202 can be enforced without tariffs. Indeed, this is precisely the kind of issue where deference should be at its zenith. *See Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); *Chevron,* 467 U.S. at 864-66. Thus, there is simply no foundation for AT&T's argument that permissive detariffing will undermine the statutory scheme.

In any event, the Commission's judgments are manifestly reasonable, and plainly entitled to deference under *Chevron*. Tariff filings are required to aid, through publication of charges, in the prevention of unreasonable rates and unjust discrimination. But the Commission in

[8] In any event, the significance AT&T attributes to this point is considerably overstated. Tariffed rates for nondominant carriers may now go into effect on one day's notice, effectively precluding FCC suspension and investigation prior to the effective date of a tariff. One day notice has been upheld under the ICA, *see Southern Motor Carriers Rate Conference v. United States,* 773 F.2d 1561, 1571 (11th Cir. 1985), in the face of an argument that it effectively repealed the suspension provision of the ICA.

this proceeding, following its decade-old analysis, concluded that mandating tariffs for firms lacking market power is not needed to serve those purposes and, indeed, tends to *harm* the Act's basic policy of lower rates (47 U.S.C. § 151). For such nondominant carriers, the Commission concluded, market forces and the complaint process will be sufficient to serve those purposes. *See* Pet. App. 28a (noting availability of complaint process under 47 U.S.C. § 208). Nothing in the Act requires the Commission to rely on the review and suspension process of § 204, rather than the complaint process, as its primary means of enforcement. *Cf. Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 543-46 (1978).

The goal of "just and reasonable" rates is to approximate the rates produced by a competitive market by trying to bring prices down to cost.[9] It is therefore fair to presume that prices set by firms lacking market power will be just and reasonable: If they were too high, a competitor would underbid them.[10] Similarly, discrimination in an economically significant sense—differential treatment of "similarly situated" customers (AT&T Br. at 24 n.33, 30)—depends on market power.[11] If a firm without

[9] *See* 1 A. Kahn, *The Economics of Regulation* 26 (1988) ("Just as competition is supposed to hold prices down to the cost of production . . . so regulation takes cost as its standard of the 'revenue requirements' of public utility companies, hence the 'just and reasonable' rates that the typical controlling statute enjoins them to maintain."); *id.* at 63 ("The traditional legal criteria of proper public utility rates have always borne a strong resemblance to the criteria of the competitive market in long-run equilibrium.").

[10] *See* Pet. App. 6a; First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* 85 F.C.C.2d 1, 20-21 (1980); Notice of Inquiry and Proposed Rulemaking, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* 77 F.C.C.2d 308, 334-36 (1979).

[11] *See* L. Sullivan, *Handbook of the Law of Antitrust* 89 (1977) ("A firm will not discriminate unless it has market power. In a competitive market, a firm cannot sell above the competitive price

market power succeeds in charging different prices for the same service, those differences presumptively result from different costs of serving the particular customers, reflecting competitive forces: Otherwise the "disfavored purchaser (that is, a purchaser asked to pay a price above marginal costs) would walk away from that seller and find someone willing to sell at the competitive price." H. Hovenkamp, *Economics and Federal Antitrust Law* 339 (1985).[12] Thus, the Commission plainly acted reasonably when it concluded that unreasonable or discriminatory pricing by nondominant carriers would be sufficiently rare that a universal tariff requirement was not needed.

Furthermore, it is simply incorrect that price discrimination provisions are unenforceable in the absence of published rates. Federal and state authorities have long enforced general price discrimination statutes, such as the Robinson-Patman Act, 15 U.S.C. § 13(a), and state unfair competition laws, without any requirement that prices be published.

At bottom, AT&T's argument rests not on the text of the Communications Act or any genuine incompatibility between permissive detariffing and the policies embodied in the Act, but on the historic significance of the "filed rate doctrine." As AT&T would have it, filed rates must continue to be required in all circumstances because historically it has been so, and the 1934 Congress must have

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and has no reason to sell below it; all its sales will cluster at its costs (including a reasonable return)."); *see also* 9 P. Areeda, *Antitrust Law* ¶ 1711a, at 119-20 (1991); F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 489 (3d ed. 1990) ("[T]he seller must have some control over price—some monopoly power. A purely competitive firm cannot discriminate profitably.").

[12] Not even the Robinson-Patman Act condemns "price differences that result from or further the forces of competition." *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2586 (1993); *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n*, 440 U.S. 69, 80 (1979).

assumed it would be so when it passed the Communications Act.

The 1934 Congress may have anticipated that the FCC would rely on tariff-based regulation to control the monopoly power of the Bell System. But the critical question is whether the 1934 Congress legislated so as to foreclose any departure from an unyielding tariff requirement. Where, as here, a statute is premised on a broad public interest regulatory framework giving the agency wide latitude, and where a radical change in the structure of the regulated industry has occurred since Congress passed the original legislation, reviewing courts should be particularly careful not to mistake unlegislated assumptions about regulatory methods for legislatively imposed obligations. Innovations should be permitted so long as they are not directly foreclosed by the clear commands of the statute, even if they are in some tension with unlegislated assumptions.[13]

That is precisely the lesson of the *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968).[14] In *Permian Basin* the Court upheld a Federal Power Commission (FPC) rule that (i) replaced traditional filed rate requirements with a regime whereby certain producers abided by "area rates" and (ii) exempted small producers from tariff filing requirements. *Id.* at 764-65. The Court acknowledged that the filing requirements in the Federal Power Act were "without exception or qualification," *id.* at 787,[15] yet it upheld the filing exemption for small pro-

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[13] *See* Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2088 (1990).

[14] *Cf. Kansas Cities v. Federal Energy Regulatory Comm'n*, 723 F.2d 82, 95 (D.C. Cir. 1983) ("The . . . combination of technical compliance with the language of the statute plus unusual circumstances justif[ies] departure from the agency obligations ordinarily implied by such language . . . ."); *New England Coalition on Nuclear Pollution v. Nuclear Regulatory Comm'n*, 727 F.2d 1127, 1129 (D.C. Cir. 1984).

[15] The language of the tariff statute is virtually identical to the Communications Act: "[E]very natural-gas company shall file

ducers as "fully consistent with the terms and purposes of [the Commission's] statutory responsibilities" and held that the exemption "did not exceed the Commission's statutory authority." *Id.*[16] As the Court acknowledged in *Permian Basin*, the FPC's modifications of the regulatory scheme departed from Congress's original assumption that every producer would have to file each of its rates individually. But the Court concluded that these assumptions should not preclude the FPC from adjusting the regulatory regime to account for substantial changes in the market structure of the regulated industry.

Because the Court in *Permian Basin* found under far less clear statutory language that the FPC had the power to remove tariff filing requirements under certain conditions, it should follow *a fortiori* that the FCC has the authority under Section 203(b)(2) to do so, provided that the FCC continues to enforce the substantive requirements of Title II.[17] An interpretation of the FCC's modification

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with the Commission . . . schedules showing all rates and charges," 15 U.S.C. § 717c(c), as is its proscription of discriminatory rates, *id.* § 717c(b).

[16] The relevant language in the Federal Power Act is, if anything, less expansive than that in the Communications Act. *Compare* 15 U.S.C. § 717o (FPC may "classify persons and matters . . . and prescribe *different requirements*") *with* 47 U.S.C. § 203(b)(2) (FCC may "*modify any requirement* made by or under the authority of this section") (emphasis added). The "different" requirement upheld in *Permian Basin* was a complete exemption from the requirement to file tariffs.

[17] *Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380 (1974), is not to the contrary. In that case, the Court simply held that the Commission's power to alter the mechanism by which it enforced its substantive mandates—i.e., substituting area-rates for individual rates, and removing tariff requirements—did not extend so far as to allow the FPC to exempt a class of producers from the underlying substantive requirement that rates be just and reasonable. In this case, the Commission has done no such thing. *See Federal Energy Regulatory Comm'n v. Pennzoil Producing Co.*, 439 U.S. 508, 516-17 (1979) ("*Texaco* did not purport to circumscribe so severely the Commission's discretion to decide what formulas and methods it will employ to ensure just and reasonable rates. Indeed

authority that permits wider rather than narrower leeway for the Commission to respond to changing market conditions is consistent with the broad delegation of flexible authority that is at the heart of the Communications Act, *see* 47 U.S.C. § 154(j); *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. at 138, consistent with the teaching of *Permian Basin*, and consistent with the deference reviewing courts owe to agency exercises of power expressly delegated by Congress. *See Chevron*.

C. *Maislin* and the Interstate Commerce Act Do Not Support a More Restrictive Reading of Section 203(b)(2).

AT&T also continues to rely on the "filed rate doctrine," as elaborated by this Court in the context of the Interstate Commerce Act in *Maislin Indus. U.S., Inc. v. Primary Steel Inc.*, 497 U.S. 116 (1990), and prior cases. *See* AT&T Br. at 25-41. The Communications Act was generally modelled on the Interstate Commerce Act (ICA) (*see* S. Rep. No. 781, 73d Cong., 2d Sess. (1934)). What this case involves, however, is the scope of the explicitly granted authority to modify the tariff filing requirement in the Communications Act.[18] And that authority is not controlled by the Interstate Commerce Act, much less by precedents addressing "the obligation to adhere to those rates [which are filed]," rather than the distinct "obligation to file rates" in the first place. AT&T Br. at 28.

1. Important differences between the relevant modification provisions of the ICA and the Communications Act—49 U.S.C. § 10762(d)(1) versus 47 U.S.C.

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the decision underscored the wide discretion vested in the Commission.").

[18] There appears to be no legislative history directly addressing the scope of the modification authority. *See* S. Rep. No. 781, 73d Cong., 2d Sess. (1934). The critical Senate Report indicates that the Communications Act was *generally* modelled on the ICA. *Id.* at 2. But that fact provides no controlling guidance. *See* pages 16-18, *infra*.

§ 203(b)(2)—make clear that a narrow construction of the former should not control the latter. First, the ICA's Section 10762(d)(1) modification authority does *not* by its terms apply to Section 10761(a)'s command (the counterpart of the first clause of Section 203(c)) that the carrier not offer service without filing a tariff (the flip side of the direct command to file a tariff). Rather, Section 10762(d)(1) permits modification only of the "requirements of *this* section," thus excluding Section 10761; Section 10762 addresses only the notice period for tariffs. Although AT&T now contends that this separation of the modification authority and the filed rate requirement as a consequence of the 1978 recodification is immaterial (AT&T Br. at 27-28), this separation was central to the conclusions of both the D.C. Circuit and the Interstate Commerce Commission (ICC) that the filed rate requirements of the ICA could not be made conditional. *See Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986); *International Joint Through Rates Involving Ocean Carriers*, 1 I.C.C.2d 978 (1985). Section 203(b)(2), by contrast, allows modification of any requirement in Section 203, necessarily including the companion filing requirements of both Section 203(a) and Section 203(c).

Second, the command of Section 10761(a) is subject to a specific, separate modification provision, and *that* provision (§ 10761(b)) is conspicuously applicable only to *contract* carriers, thus pointedly excluding common carriers. *See Maislin*, 497 U.S. at 135-36. The modification authority of Section 10762(d)(1) might have to be read narrowly in light of the negative implication that could be drawn from that pointed limitation in Section 10761(b). No such separate provision, or basis for a negative implication, is present under the Communications Act.

2. Furthermore, *Maislin* did not even address the scope of agency authority to modify the duty to file a tariff. Rather, it addressed the duty to *follow* a tariff that has been filed, and the scope of agency authority to

decline to enforce *that* duty. At no point in *Maislin* did the Court construe provisions authorizing exceptions to the tariff *filing* requirement because the ICC did not purport to act under such provisions.

As Justice Scalia's concurrence makes clear, *Maislin* involved the unmodified "obligation to charge the filed rate," *not* the scope of the duty to file rates in the first place (which *is* subject to exceptions). *Maislin*, 497 U.S. at 136-37. Thus, the Court held that the "filed rate doctrine" barred the ICC from deeming collection of the full filed rate inequitable, because the statute itself "forbids . . . collection of rates lower than the filed rate." *Id.* at 130. The doctrine's bar on "deviation from the filed rate" (*id.* at 131), and hence the Court's holding in *Maislin*, does not apply where there is no filed rate at all. The permissibility of exceptions to the filing requirement presents a separate question. Whatever the answer under the ICA, the FCC's answer under the Communications Act was plainly reasonable.

The distinction between the duty to follow filed rates and the duty to file rates in the first place is a crucial one for regulatory schemes involving broad delegation of authority to administrative agencies, like the Communications Act and the ICA. If the agency has left the filing requirement in place, there can be little basis for authorizing *sub silentio* an exemption from filing through disregard of a filed tariff—which works a kind of deception of the public. *Cf. Maislin*, 497 U.S. at 130, 133. In contrast, when the agency expressly and reasonably determines that tariffs need not be filed under certain conditions, there is neither a misleading of the public nor a lack of authoritative administrative findings as to the needed means of fulfilling the statutory objectives. In short, however rigid the statutory bar on an agency's decision to declare adherence to filed rates inequitable—the issue in *Maislin*—that bar simply does not extend to a responsible agency determination of the circumstances in which carriers should not have to file tariffs.

D. Congressional Ratification of Permissive Detariffing Defeats AT&T's Argument.

1. Contrary to AT&T's argument (AT&T Br. at 42-43), MCI does not contend that Congress has merely acquiesced in the Commission's permissive detariffing rule. Rather, MCI argues that Congress was well aware of permissive detariffing and repeatedly *ratified* it by amending Title II, including Section 203 itself, without disturbing the FCC's interpretation of its authority. *See* MCI Br. at 28-29. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986). AT&T simply ignored this "persuasive evidence" of congressional intent. *See generally* Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 1021-1022 (1992).

Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986), makes exactly this point. There, the Court refused to overrule the judicially-crafted *Keogh* "filed rate" exemption from antitrust damages because Congress, fully aware of *Keogh*, had amended the Clayton Act without altering the judicial interpretation. Thus, far from supporting AT&T's position, *Square D* makes clear that ratification "lends powerful support" to the validity of the Commission's permissive detariffing rule. 476 U.S. at 419.

2. AT&T also fails to come to grips with the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226, which makes clear that Congress understood, and agreed with, permissive detariffing. AT&T suggests that Congress enacted TOCSIA cognizant of the "historic understanding" that rates must be filed. AT&T Br. at 43. That is simply wrong. The House and Senate reports both make clear

that Congress knew of the FCC's permissive detariffing rule. Congress enacted TOCSIA because it wanted to *restore* tariff requirements for pay phone operators, as a result of particular abuses. Furthermore, Congress's decision to authorize the FCC to remove TOCSIA's particular tariff requirements, 47 U.S.C. § 226(h), would make little sense if, as a result of exercising that power, carriers would be required to comply with the *more extensive* tariff requirements of Section 203. *See* MCI Br. at 30-31. *See generally National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) (agency interpretation should be accepted if a contrary interpretation would render subsequent legislation superfluous).

AT&T's argument that TOCSIA was not intended to "alter" obligations under other sections of the Communications Act is beside the point. AT&T Br. at 42-43. MCI does not contend that TOCSIA "altered" anything. To the contrary, it is MCI's position that the FCC's permissive detariffing rule, which was promulgated long before TOCSIA and was well known to Congress, constitutes a *correct* interpretation of Section 203(b).

3. Finally, AT&T cites to 47 U.S.C. § 332(c)(1) (allowing the FCC to waive tariff requirements for commercial mobile service providers) to argue that Congress knows how to give the FCC authority to forego tariff filing requirements when it wants to do so. *See* AT&T Br. at 44. The legislative history of Section 332(c)(1), however, strongly supports the conclusion that Congress was aware of and agreed with the FCC's permissive detariffing policy. This amendment—which focused on a particular provision of Title III (and not Title II) of the Act, and was contained in the massive Omnibus Budget Reconciliation Act of 1993—was undertaken with full awareness of the on-going litigation challenging the FCC's permissive detariffing policy. *See* H.R. Rep. 111, 103d Cong., 1st Sess. 260-61 (1993). As Senator Inouye stated, the amendments were intended to "*clarify* that the [FCC] has the flexibility in implementing the regulatory parity pro-

visions to amend, modify, or forbear from any regulation" of certain carriers in the mobile services marketplace. 139 Cong. Rec. S7856 (daily ed. June 24, 1993) (emphasis added).

Far from rejecting the FCC's permissive detariffing policy, the amendments *embraced* the very analysis used by the FCC in permissive detariffing. Indeed, Congress specifically instructed the FCC that it *could not* modify requirements necessary to ensure just and nondiscriminatory rates, but that it *could* make tariff filing optional for nondominant carriers.[19] Thus, Congress plainly perceives no incompatibility between permissive detariffing and enforcement of Title II's substantive requirements.[20]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[19] H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993).

[20] In the only other instance where Congress enacted detariffing legislation, it also made clear that it was not altering the FCC's then nascent detariffing policy. *See* 47 U.S.C. § 222. In bringing record carriers under Title II with the Record Carrier Competition Act of 1981, sponsors of the bill made clear that the FCC already had the authority to detariff: "The basic concept in these proposed amendments is that the Federal Communications Commission currently *has the authority* to do everything that the bill *directs* them to do. . . . It is not our intent to override, either explicitly or implicitly, other sections of the Communications Act. . . . Nor are we saying that the Commission does not currently *have the authority to forebear from regulation.*" 127 Cong. Rec. S31986 (daily ed. Dec. 16, 1981) (statement of Sen. Cannon) (emphasis added); *see id.* at S31985 (statement of Sen. Goldwater). The Record Carrier Act actually *reduced* the FCC's discretion by directing the Commission to detariff when certain conditions were present, rather than leaving it entirely to the Commission's discretion.

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Petitioner,
v.
AMERICAN TELEPHONE &
TELEGRAPH COMPANY, ET AL.,
Respondents.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,
v.
AMERICAN TELEPHONE &
TELEGRAPH COMPANY, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL BUSINESS MACHINES CORPORATION IN SUPPORT OF PETITIONERS

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Nos. 93-356, 93-521

In the Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS, INC.,
v. *Petitioner,*
AMERICAN TELEPHONE &
TELEGRAPH COMPANY, ET AL.,
Respondents.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
v. *Petitioners,*
AMERICAN TELEPHONE &
TELEGRAPH COMPANY, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL BUSINESS MACHINES CORPORATION IN SUPPORT OF PETITIONERS

IBM respectfully submits this brief in support of petitioners United States and Federal Communications Commission and MCI Telecommunications Corporation.[1]

[1] IBM files this brief with the consent of all the parties. Letters consenting to the filing of this brief have been lodged with the Clerk.

INTEREST OF AMICUS CURIAE

IBM is a manufacturer of equipment used with telecommunications services and is a substantial user of such services. In both capacities, IBM has a significant interest in the maintenance of a competitive marketplace for telecommunications services. This case involves a policy of the Federal Communications Commission ("Commission") under section 203(b)(2) of the Communications Act of 1934 ("Act"), as amended, 47 U.S.C. § 203(b)(2), to permit "nondominant" carriers not to file tariffs for their interstate services while remaining subject to other regulatory requirements under the Act. The Commission has found this "forbearance" or "permissive detariffing" policy to be an effective means of promoting competition in telecommunications services and thereby achieving the goals of the Act. IBM has structured its business dealings and made investment decisions in reliance on the Commission's policy, on the assumption that the marketplace for telecommunications services would remain competitive and, indeed, become increasingly competitive. IBM participated in the Commission's rulemaking proceeding that led to its decision reaffirming the forbearance policy and to the case at bar. The ruling of the court below would invalidate the Commission's decision.

STATEMENT

This statement sets forth briefly the historical context of the Commission's permissive detariffing policy at issue here. The question in this case is whether the Commission has flexibility to tailor its federal tariff regulation to achieve the core goal of the Act: "to make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. The court of appeals held that the Commission *must* require all common carriers subject to its jurisdiction under Title II of the Act to file the rates, terms, and conditions of all their interstate services with the Commission.

We address in the Argument whether the statute must be read to impose such a requirement. Here we demonstrate that the Commission has never in the 60-year history of the Act implemented the statute in that fashion. To the contrary, the Commission has often and in varied contexts concluded that it can best fulfill its statutory mandate by forbearing from requiring the filing of tariffs for some of the services that fall within the scope of its jurisdiction under the Act. Long before its forbearance decisions with respect to nondominant carriers and, indeed, before competition emerged in telecommunications equipment and services, the Commission exempted interstate facilities and services from federal tariffing where it found such regulation to be unnecessary or counterproductive to the attainment and maintenance of an "efficient Nation-wide and worldwide . . . communication service." 47 U.S.C. § 151.

The starting point for the Commission's approach in this regard is the vast scope of its jurisdiction over communications services. The Act grants the Commission jurisdiction over "all interstate . . . communication by wire or radio." 47 U.S.C. § 152(a). As defined in the Act, "communication by wire or radio" extends from the point of origin to the point of reception, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. §§ 153(a), (b). Any common carrier that provides such communication on an interstate basis is subject to the Commission's jurisdiction under Title II, 47 U.S.C. §§ 201-226, and, therefore to the tariff requirement of section 203, 47 U.S.C. §203.

Because the telecommunications marketplace is increasingly national (and worldwide) in scope, the vast majority of communications services have some interstate aspect. The local telephone exchanges that carry calls within a community are used also to originate and terminate calls

that go across the country or around the world. Accordingly, even local telephone service is recognized to perform an interstate function -- that of providing "exchange access" for calls to or from another state or country. The courts have recognized that this "local exchange portion of interstate services" is subject to Commission jurisdiction under Title II, even though the facilities to provide it may be in a single state.[2] Thus, although Congress in section 2(b) of the Act preserved state authority over purely intrastate communications,[3] the great bulk of communications services have some interstate aspect that brings them within the Commission's Title II jurisdiction. As the D.C. Circuit has observed, "[e]very court that has considered this matter . . . has held that the physically intrastate location of the service does not preclude Commission jurisdiction so long as the service is used for the completion of interstate communications." *National Association of Regulatory Utility Commissioners*, 746 F.2d at 1499. Indeed, "purely intrastate facilities and services used to complete even a single interstate call may become subject to Commission regulation to the extent of their interstate use." *Id.* at 1498.

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[2] *New York Tel. Co.*, 76 F.C.C.2d 349, 352 (1980), *aff'd sub nom. New York Tel. Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980). The Commission's jurisdiction extends to all facilities and services used to originate, transport, or terminate interstate communications. *Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984); *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1050 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977); *Eastex Tel. Coop., Inc.*, 45 F.C.C. 2d 464, 468-70 (1974); *Jordaphone Corp. of America v. AT&T*, 18 F.C.C. 644, 670 (1954).

[3] "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier." 47 U.S.C. § 152(b); *see Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

Thus, if the Commission had the desire (and resources) to do so, it could have required the filing of federal tariffs not only for all facilities and services that cross state borders but also for all local exchange networks, services, and carrier-provided terminal equipment used even for isolated interstate calls.[4] But the Commission wisely has never exercised the full scope of its authority. Instead, it has required federal tariffing only where it concluded that such regulation was necessary to achieve the purposes of the Act. As to terminal equipment, the Commission left "[t]he vast majority" of such equipment to be "regulated by the states." *North Carolina Utilities Commission*, 552 F.2d at 1050. It did so even though consumers obviously used their telephones and other terminal equipment for interstate calls, and the Commission "never conceded that joint equipment is beyond federal jurisdiction should the need for federal action arise." *Id.*[5]

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[4] For years, the Commission and state regulatory authorities allowed carriers to include terminal equipment in their regulated communications offerings. This practice ended in the early 1980's, when the Commission determined that customer premises equipment no longer should be regulated as part of common carrier services. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 487, *recon.*, 84 F.C.C.2d 50 (1980), *further recon.*, 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[5] When the Commission subsequently deregulated customer premises equipment and "enhanced" services (services that provide something more than mere transport of information), it based that action primarily on the ground that these offerings should no longer be considered "common carrier" services. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d at 430-32. However, both the Commission and the D.C. Circuit acknowledged that the Commission's action could be based alternatively on the Commission's forbearance power, "[t]o the extent that certain enhanced services could lawfully be regulated . . . as common carrier services." *Computer and Communications Indus. Ass'n v.*

For example, in *Diamond International*, the Commission declined to require federal tariffing of PBXs (a form of terminal equipment) because,

> [g]enerally, the charges relating to PBX's and related services, even though used in connection with interstate service, are permitted to be contained in the exchange tariffs filed with the states where such facilities are also used in connection with exchange service.[6]

The D.C. Circuit upheld this decision since "[n]othing in the record [suggested] that the Commission's decision to refrain from exercising jurisdiction . . . [would] substantially affect the conduct or development of interstate communications."[7]

Similarly, in *Department of Defense v. American Telephone & Telegraph Co.*, 80 F.C.C.2d 287, 291 (1981), the Commission declined to require federal tariffing of terminal equipment used for interstate communications, noting:

> [A]lthough we recognize our jurisdiction over jointly-used terminal equipment to the extent they are used

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FCC, 693 F.2d at 209-11; *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d at 434-35.

[6] *Diamond Int'l Corp. v. AT&T*, 70 F.C.C.2d 656, 659-60 (1979), *aff'd sub nom. Diamond Int'l Corp. v. FCC*, 627 F.2d 489 (D.C. Cir. 1980). In an early decision, the Commission required federal tariffing of terminal equipment furnished in connection with teletypewriter exchange ("TWX") service, declaring that "sound regulatory policy requires that charges for a service such as TWX, which is so predominantly interstate in its use, should be contained in tariffs on file with this Commission." *Am. Tel. & Tel. Co.*, 38 F.C.C. 1127, 1133 (1965). Dicta in that decision suggest a lack of forbearance power, *id.*, but those dicta do not survive the Commission's many subsequent considered exercises of such power.

[7] *Diamond Int'l Corp.*, 627 F.2d at 493.

> interstate, our practice has generally been to defer tariff authority over such equipment to the jurisdiction of the appropriate state commissions.

The Commission said that it would exercise jurisdiction "where it can be shown that federal action is necessary to protect the conduct or development of interstate communications." *Id.*

The Commission has taken the same approach with respect to *services* that are mostly local in character -- it has declined to regulate them to the full extent of its jurisdiction. Although local exchange service is used to originate and terminate interstate calls, the Commission has not required federal tariffing except in rare cases. For example, the Commission has generally declined to require federal tariffs for local exchange service used to carry interstate traffic to and from interstate foreign exchange ("FX") and Common Control Switching Arrangements ("CCSA") services. *American Telephone and Telegraph Co.*, 56 F.C.C.2d 14, 19, 21 (1975), *aff'd sub nom. California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978). The Commission has asserted jurisdiction and required federal tariffing only in the exceptional case where it has found that a state tariff for FX and CCSA arrangements discriminated against interstate service.[8]

In another context, the Commission relied on policy objectives concerning the smooth implementation of its

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[8] *See New York Tel. Co.*, 76 F.C.C.2d 349. More recently, since the divestiture of AT&T's local exchange operations, the Commission has adopted a federally tariffed access charge scheme in which the costs attributable to interstate access are recovered under federal tariffs, in part from the end user and in part from the interexchange service provider. *MTS & WATS Mkt. Structure*, Third Report & Order, 93 F.C.C.2d 241, *recon.* 54 Rad. Reg. 2d (P & F) 615 (1983), *further recon.*, 97 F.C.C.2d 834, *aff'd per curiam sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs*, 737 F.2d 1095 (D.C. Cir. 1984).

Open Network Architecture plan to justify forbearing from requiring federal tariffs for Complementary Network Services ("CNSs") used in connection with interstate services. CNSs are special features offered to subscribers over their local lines to facilitate their access to and use of interstate enhanced services. The Commission found that state tariffing would suffice.[9]

In the cellular telephone area as well, the Commission has asserted its jurisdiction over cellular communications, relying primarily on its authority to license or certify how many and which carriers will operate cellular systems.[10] However, it declined to exercise its authority "to assert federal primacy" over cellular communications providers. *Cellular Communications Systems*, 86 F.C.C.2d at 505. Instead, the Commission has preserved for the states an active role in certifying providers so long as the state procedures do not frustrate the Commission's "policy of introducing cellular service in a competitive environment without significant delay." *Id.* at 503. Moreover, the Commission has expressly left tariffing to the states. *Cellular Communications Systems*, 90 F.C.C.2d at 96.[11]

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[9] *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd. 1 (1988), *recon.*, 5 FCC Rcd 3084, 3085 (1990) (reaffirming decision to allow state tariffing of CNSs), *aff'd sub nom. California v. FCC*, No. 93-70336 (9th Cir. Sept. 23, 1993).

[10] *An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469, 505 (1981) ("*Cellular Communications Systems*"), *recon.* 89 F.C.C.2d 58, 94-96, *further recon.* 90 F.C.C.2d 571 (1982).

[11] In declining to exercise its full authority over cellular services, the Commission relied on an earlier decision to forbear from regulating mobile services. 86 F.C.C.2d at 503 (citing *Regulatory Policies and Procedures in the Domestic Public Land Mobile Radio Service*, First Report and Order, 69 F.C.C.2d 398 (1978)). The Commission subsequently concluded that federal interests required it to regulate mobile services more actively. *Preemption of State Entry Regulation in the Public Land Mobile Service*, 59 Rad. Reg. 2d (P & F) 1518, 1530-1532 (1987) (preempting state entry laws or regulations prohibiting or impeding the entry of common carriers providing conventional paging services and two-way mobile services). The preemption order invokes the Commission's jurisdiction to regulate in this area, which it had previously left to the states.

Finally, citing "administrative and other practical concerns," the Commission has concluded that it need not regulate all physically intrastate private lines carrying interstate traffic. Although the Commission has repeatedly asserted its jurisdiction to require federal tariffs for any private line that carries any interstate calls,[12] it recently decided to defer to state regulation of lines on which the proportion of interstate traffic is 10 percent or less. *MTS and WATS Market Structure*, 4 FCC Rcd 5660, 5660-61 (1989).

The Commission's permissive detariffing policy for nondominant carriers arises against this background. Having long forborne from exercising its full jurisdiction in the interest of achieving a practical accommodation between federal and state regulators, the Commission more recently confronted a new situation in which forbearance appeared to serve the policies of the Act: The traditional monopoly in telephone service began to give way to a competitive environment with multiple service providers. In the *Competitive Carrier* proceeding, the Commission determined that, with respect to carriers that lack market power ("nondominant carriers"), it could rely in the first instance on a tool other than federal tariffs -- market forces -- "to make available . . . to all the people of the United States a

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[12] *AT&T and the Bell System Operating Companies Restrictions on the Resale and Sharing of Switched Services Used for Completion of Interstate Communications*, 94 F.C.C.2d 1110, 1114-15 (1983), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984); *New York Tel. Co.*, 76 F.C.C.2d at 353; *American Tel. & Tel. Co.*, 56 F.C.C.2d at 19.

rapid, efficient, Nation-wide, and world-wide . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. In this area, as in the federal/state context, the Commission retained its ability to ensure compliance with the substantive provisions of the Act by adhering to the section 208, 47 U.S.C. § 208, complaint process, under which it entertains claims of violation of the Act, and by preserving the option of requiring federal tariffs if necessary.

In its *First Report and Order* in *Competitive Carrier*, 85 F.C.C.2d 1 (1980), the Commission adopted a two-tiered regulatory scheme, relaxing the tariffing requirements of section 203 as they applied to nondominant carriers. Recognizing its mandate to ensure "'efficient Nation-wide and worldwide . . . communication service,'" the Commission concluded that application of its traditional regulatory procedures to nondominant carriers imposed "unnecessary and counterproductive regulatory constraints" upon carriers who lacked the ability or incentive to set unreasonable or discriminatory prices. *Id.* at 2-4, 20-21 (citing 47 U.S.C. § 151).

In subsequent years, the Commission incrementally relieved specified classes of nondominant carriers of the obligation to file tariffs.[13] At the same time, the Commission continued to apply the remaining rate provisions of Title II, including the requirement that rates be just, reasonable, and nondiscriminatory and the section 208 complaint process.

Citing its "duty to determine that its rules promote the public interest when applied to particular carriers . . . and to refrain from imposing and to remove unnecessary regulatory burdens on carriers," the Commission ultimately

[13] *Second Report and Order*, 91 F.C.C.2d 59 (1982) (resellers of domestic telecommunications services), *recon. denied*, 93 F.C.C.2d 54 (1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (Oct. 14, 1983) (resellers operating on domestic off-shore points).

extended permissive detariffing to virtually all remaining categories of nondominant carriers.[14] The Commission reasoned that requiring nondominant providers to file tariffs imposed unreasonable costs and delayed the introduction of services beneficial to consumers. Moreover, the Commission concluded that nondominant providers' "filings can impede entry, impair competitive pricing, and facilitate collusive conduct." *Fourth Report and Order*, 95 F.C.C.2d at 555 n.1.

Because detariffing was permissive, many nondominant common carriers chose to continue filing their rates with the Commission. In a subsequent order in the *Competitive Carrier* proceeding, the Commission made detariffing mandatory for nondominant carriers, effectively forbidding such filings. *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), *vacated and remanded sub nom. MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). The D.C. Circuit ruled that this mandatory detariffing policy exceeded the Commission's authority to modify federal tariffing requirements under section 203(b) of the Act. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985). However, it expressly refrained from deciding whether the Commission's permissive detariffing orders were valid. *Id.*

Four years after the *MCI* decision (and six years after facilities-based nondominant carriers were permissively detariffed), AT&T filed an administrative complaint against MCI challenging MCI's provision of nontariffed services to

[14] *Fourth Report and Order*, 95 F.C.C.2d 554, 580 (1983) (nondominant facilities-based carriers; Commission found that there was no evidence that requiring tariff filings "from certain specialized common carriers to prevent them from charging unjust or unreasonable rates or making service unavailable" is necessary to achieve the purposes of the Act); *see also Fifth Report and Order*, 98 F.C.C.2d 1191 (1984), *recon.*, 59 Rad. Reg. 2d (P & F) 543 (1985) (additional categories of providers).

certain large business customers. The complaint prompted the Commission to initiate a rulemaking proceeding in order to reexamine its forbearance policy. See *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 8072 (1992); Pet. App. B ("*Rulemaking Order*").

Reaffirming its earlier decisions, the Commission concluded in the *Rulemaking Order* that it does have power to forbear from requiring tariffs where that furthers the goals of the Act. Pet. App. B at 9a-21a. The Commission found that although section 203(a) requires "every carrier" to file tariffs for common carrier services, section 203(b)(2) in terms allows the Commission to "modify any requirement made by or under the authority of [the] section . . . by general order applicable to special circumstances or conditions." The Commission concluded that the plain language of the provision expressly "limits the Commission's modification power in one circumstance only -- the FCC 'may not' expand the 120-day . . . notice period for tariff filings prescribed in section 203(b)(1)." *Id.* at 13a. This single limitation, the Commission held, "strongly suggests that Congress did not otherwise intend to limit [its] authority, upon a proper public interest showing, to alter the requirements of section 203." *Id.* Moreover, the Commission found substantial evidence that "Congress has demonstrated its awareness of the Commission's forbearance policy and made no attempt to disturb it." *Id.* at 23a.

The Commission concluded that construing section 203(b)(2) to allow it to forbear from requiring tariffs advances the purposes of the Communications Act. It stressed that forbearance power enables the Commission to tailor its regulation to changing practical circumstances, while preserving its ability to ensure compliance with the substantive provisions of the Act through the complaint process and the power to reimpose tariff requirements. *Id.* at 26a-31a. Reviewing ten years of experience with permissive detariffing of nondominant carriers, the Commission found that the policy had helped to promote competition and had produced consumer benefits such as increased options "with respect to the price of services, type of services, and selection of carriers." *Id.* at 30a. The Commission affirmed its earlier conclusions that mandatory tariff regulation of nondominant carriers would inhibit "price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends." *Id.* at 27a.

The court below summarily reversed the *Rulemaking Order*. It based its action on its earlier *MCI* mandatory detariffing decision and its intervening decision overturning the Commission's dismissal of MCI's complaint, *American Telephone & Telegraph Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); Pet. App. C. The court's summary order did not discuss the Commissions findings in the *Rulemaking Order*.

SUMMARY OF ARGUMENT

This case calls into question the Commission's authority to use forbearance as a regulatory tool in achieving its statutory mission to "make available, so far as possible . . . a rapid, efficient . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. Section 203(b)(2) of the Act, 47 U.S.C. § 203(b)(2), allows the Commission to "modify any requirement made by or under the authority" of section 203, which otherwise requires carriers to file tariffs. The Commission interprets section 203(b)(2) to authorize permissive detariffing of services where that will further the goals of the Act. The court below summarily rejected that interpretation. In so doing, the court violated the rule of judicial deference enunciated in this Court's *Chevron*

decision by substituting its judgment for that of the expert agency charged with implementing the Act.[15]

Chevron states the governing principle very clearly: A reviewing court must defer to an agency's reasonable interpretation of its governing statute absent clear legislative intent to the contrary. The court must first consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If the statute is found to be "silent or ambiguous with respect to the specific issue, the court must then determine whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the agency's interpretation is indeed "rational and consistent with the statute," *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987), that interpretation must be upheld. *Chevron*, 467 U.S. at 842-43. Under this principle, not applied by the court below, the Commission's reasonable interpretation of section 203(b)(2) must be accepted.

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF SECTION 203(b)(2) TO ALLOW PERMISSIVE DETARIFFING IS CONSISTENT WITH THE PLAIN MEANING OF THE STATUTE.

"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291

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[15] *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

(1988).[16] Short of using the precise words "permissive detariffing," Congress could not have expressed its intention more clearly in giving the Commission authority to forbear from imposing tariffing requirements: The Commission may "modify any requirement" under section 203. 47 U.S.C. § 203(b)(2).[17] Construing this language literally, the Commission properly concluded that the power to "modify" includes the right to forbear from requiring tariffs for particular services or service providers.

Congress authorized the Commission to modify "any" requirement of section 203 save one: The Commission "may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." 47 U.S.C. § 203(b)(2). The normal inference from the existence of a specific exception to a statutory command is that there are no other exceptions.[18] That inference is buttressed here by the expansive language Congress used in conferring the modification authority. Section 203(b)(2) empowers the Commission to modify "any" requirement in the section at "its discretion."[19]

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[16] *See also Sullivan v. Everhart*, 494 U.S. 83, 89 (1990); *Crandon v. United States*, 494 U.S. 152, 158 (1989).

[17] Given that Congress enacted the substance of section 203(b)(2) some sixty years prior to the inception of permissive detariffing for nondominant carriers, 48 Stat. 1064, 1071 (1934) (current version at 47 U.S.C. § 203(b)(2)), "it is reasonable to conclude that Congress lacked any specific intention regarding the regulatory treatment of [such] carriers." *Rulemaking Order*, Pet. App. B at 22a. Accordingly, a reviewing court must construe "the statutory language of 60 years ago in the light of drastic . . . change." *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 396 (1968).

[18] *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

[19] *Cf. United States v. State of Alaska*, 112 S.Ct. 1606, 1610-11 (1992) (finding broad delegation of authority in Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, prohibit-

The Commission noted in its *Rulemaking Order* that, although sections 203(a) and 203(c) speak in the language of command (every common carrier "shall" file tariffs; "no carrier . . . shall" provide services without filing tariffs), courts do not find such language controlling when confronted with "'a clearly expressed legislative intention to the contrary. . . .'" *Rulemaking Order*, Pet. App. at 13a n.48 (quoting *MCI v. FCC*, 765 F.2d at 1191). In this instance, Congress' express delegation of authority to the Commission to modify *any* requirement -- save one not at issue here -- qualifies what might otherwise have been deemed unconditional commands to the carriers. *Id.*[20]

Additional qualifying language in section 203(c) confirms that the power to "modify any requirement" under section 203(b)(2) includes the power to dispense with tariffs for particular services or service providers. Section 203(c) forbids the provision of service without a tariff, "unless otherwise provided by or under authority of [section 203(b)(2)]." 47 U.S.C. § 203(c).[21] The "unless" proviso compels the conclusion that Congress authorized the Commission to exempt services or service providers, in its discretion, from section 203(c)'s tariffing requirement. In short, the statute expressly contemplates the possibility of nontariffed services.

Section 4(i) of the Act further supports the Commission's interpretation of section 203(b)(2). *See Rulemaking Order*, Pet. App. B at 15a n.54. Dubbed the

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ing the "creation of *any* obstruction . . . *except* on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army" (emphasis added)).

[20] *See Rulemaking Order*, Pet. App. B at 14a (construing 203(b)(2)'s phrase "made by or under authority of this section" to include the entire section 203 (emphasis omitted)).

[21] *See Competitive Carrier*, 84 F.C.C.2d at 481 (construing 203(b)(2) to be the authority referenced in 203(c)).

Communications Act's "necessary and proper clause," section 4(i) empowers the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Absent explicit statutory language negating the Commission's power to forbear, the Commission's broad authority to "make such rules" should not arbitrarily be circumscribed.[22]

The court below relied on its earlier reading of the statutory language: "To 'modify' . . . "suggests to 'alter; to change in incidental or subordinate features.'" *AT&T v. FCC*, Pet. App. C at 53a (quoting *MCI Telecommunications*, 765 F.2d at 1192 (citation omitted)). The verb "modify," however, has standard definitions far broader than the lower court's construct.[23] This Court recently concluded that "the existence of alternative dictionary definitions . . . each making some sense under the statute, itself indicates that the statute is open to interpretation." *National R.R. Passenger v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) (interpreting "required" to mean "useful or appropriate" *or* "indispensable or necessary"). The lower court here ignored the broader definitions and

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[22] In addition to reviewing this affirmative evidence of its authority to forbear, the Commission carefully distinguished the cases presented in opposition to that authority. Focusing on section 203(b)'s statutory language, the Commission particularly noted the contrast between its current permissive detariffing policy and an earlier attempt at mandatory detariffing. *Rulemaking Order*, Pet. App. B at 15a-20a.

[23] *See, e.g.*, *Webster's Tenth New Collegiate Dictionary* 748 (1993) ("to make basic or fundamental changes in often to give a new orientation to or to serve a new end"); *Ballantine's Law Dictionary* 810 (3d ed. 1969) (to "effec[t] some change or qualification in form or qualities, powers or duties, purposes or objects, of the subject matter to be modified"). Even the dictionary on which the court below relied defines modify first to mean "to alter," which it in turn defines as "to make a change in." *Black's Law Dictionary* 71 (5th ed. 1979).

adopted without explanation the more confining definition of "modify" rejected by the Commission. It is just such judicial fiat -- in which a court unjustifiably substitutes its own statutory interpretation for the reasonable interpretation by an agency -- that *Chevron* was meant to forestall.

The legislative history of section 203(b)(2) offers little support for the lower court's narrow reading of "modify any requirement."[24] The legislative record here is far less probative than the language of the statute expressly empowering the Commission to exempt services from tariffing.[25] In this circumstance, a reviewing court should "defer to the expertise of the agency" when the "legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal." *Rust v. Sullivan*, 111 S. Ct. 1759, 1768 (1991).

The subsequent history of the statute strongly supports the Commission's interpretation: Congress and the courts have acquiesced in the Commission's longstanding exercise of power to forbear as a means of indirect regulation. Congress amended the timing requirement of section 203 in 1990 without indicating any disapproval of the Commis-

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[24] Indeed, because we contend that the statutory language is plain in conferring forbearance authority on the Commission, we address the legislative history only to rebut respondent AT&T's argument that the legislative history of section 203 presents overwhelming evidence to the contrary. *Cf. TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978).

[25] For example, although the legislative history of section 203(b)(2) repeatedly discusses the term "modify" in the context of the *notice* requirements for rate filings, the final language of the Act included no such limiting condition. *See e.g.*, S. Rep. No. 918, 94th Cong., 2d Sess. 2, 9-13 (1976); H.R. Rep. No. 1315, 94th Cong., 2d Sess. 8-13 (1976). *Cf. State of Alaska*, *supra* at 112 S.Ct. at 1611 (concluding that the committee reports "contain[ed] no hint of whether the drafters sought to vest in the Secretary the apparently unbridled authority the plain language of the statute seems to suggest"). *See also Chevron*, 467 U.S. at 862 (finding "the legislative history as a whole" to be "silent on the *precise issue*" before the [Court]") (emphasis added).

sion's reading of that section to allow forbearance -- a reading that was brought to Congress' attention.[26] The legislature's decision to leave standing an agency's interpretation of its governing statute is "significant" insofar as the "'failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (quoting *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267, 275 (1974)). Contemporaneous with amending section 203(b)(2), Congress adopted amendments to Title II of the Act that are not only consistent with -- but premised on -- the existence of the Commission's power to forbear from requiring tariffs under section 203.[27]

II. THE COMMISSION'S DETERMINATION THAT IT HAS POWER TO FORBEAR FROM REQUIRING TARIFFS IS BOTH RATIONAL AND CONSISTENT WITH THE ACT.

The Commission's assertion of power to forbear not only is consistent with the accepted meaning of the term "modify," but fully "rational and consistent" with the Act. *Chevron*, 467 U.S. at 845. The Commission's *Rulemaking Order* carefully elaborates the "rationale and factual basis" underlying the agency's chosen means of regulation. *See Bowen v. American Hospital Assn.*, 476 U.S. 610, 626

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[26] *See* Pub.L. 101-396, § 7(b), 104 Stat. 848, 850 (1990) (amending section 203(b)(2)'s timing requirement); *FCC and NTIA Authorizations: Hearings Before the Subcommittee on Telecommunications and Finance of the House. Committee on Energy and Commerce*, 101st Cong., 1st Sess. 30 (1990) (noting the distinction between dominant and nondominant carriers).

[27] *See* Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. §226(h) (Supp. III 1991) (requiring certain nondominant carriers, with respect to which the FCC has forborne from requiring tariffs under section 203, to file informational tariffs).

(1986). That rationale was never considered by the court below.

Congress established the Commission "to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. § 151. To enable the Commission to achieve this broad mandate, Congress gave the agency flexible tools to "regulat[e] a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). Congress wanted to ensure that the Commission possessed "sufficient flexibility to adjust itself to [the industry's] rapidly fluctuating factors," *FCC v. Pottsville*, 309 U.S. 134, 138 (1940), and thereby "avoid the necessity of repetitive legislation." *Wold Communications, Inc. v. Commission*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) (quoting *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d at 213).

As we have shown, the Commission has used this flexibility to achieve a workable sharing of regulatory responsibility between it and state agencies. The increasingly integrated telecommunications marketplace gives virtually every telecommunications service some interstate aspect. Mindful of Congress' decision, expressed in section 2(b) of the Act, to preserve state jurisdiction over purely intrastate communications, the Commission has used its forbearance power to leave tariffing at the state level in situations where there is an interstate component of the communications, but federal tariffing is unnecessary to achieve the purposes of the Act. In instance after instance throughout the history of the Act, the Commission has forborne from exercising jurisdiction under section 203 even though a service has interstate aspects that bring it within Title II of the Act. A ruling that every communications service that falls within Title II *must* be tariffed at the federal level, even where the Commission finds that federal tariffing is

unnecessary to achieve the goals of the Act, would destroy the basis for the Commission's longstanding accommodation of state regulatory interests. It would effect a massive transfer of regulatory activity from the state to the federal level, without promoting any purpose discernible in the Act.

The Commission's assertion of power to forbear is equally rational in the context of permissive detariffing of nondominant carriers. The Commission, in its *Rulemaking Order*, found that permissive detariffing has played a key role in helping to transform the previously monolithic telephone network into a system of competitive networks, in which multiple service providers vie with one another, without the impediment of tariff regulation, to meet the changing needs of users at prices constrained by competition. *Rulemaking Order*, Pet. App. B at 29a-30a.[28] More than 400 carriers offer facilities-based distance services, in competition with additional hundreds of resellers. All these interstate carriers but AT&T have been declared nondominant and thus are free under the forbearance policy to tailor their offerings to the needs of individual users. The Commission has found that this freedom produces significant consumer benefits. In particular, the Commission found that the new telecommunications services elicit-

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[28] Permissive detariffing thus furthers the statutory goal of ensuring that rates remain "just and reasonable." 47 U.S.C. § 201(b). The Commission has found that the competitive forces unleased by the forbearance policy have driven the rates for interstate telecommunications services steadily downward. *See Expanded Interconnection with Local Tel. Co. Facilities*, 7 FCC Rcd 7369, 7378 (1992), *recon.*, FCC 93-378 (released Sept. 2, 1993). Courts have recognized in other contexts that the Commission may rely on an active and competitive marketplace as a substitute for direct regulation. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) (market forces will adequately produce diversity in entertainment programming); *Wold Communication, Inc. v. FCC*, 735 F.2d at 1475 (market circumstances for satellite transponder service obviate direct regulation).

ed by competition have enabled U.S. business users to enhance their competitiveness by implementing advanced management practices, such as "just-in-time" inventory control and distributed information sharing. Permissive detariffing thus contributes to the efficiency of the many U.S. industries that rely heavily on telecommunications. *Id.*

By contrast, the Commission found that mandatory tariffing in a competitive marketplace would impede, rather than promote, competition. It found that requiring competitive sellers to file tariffs would make it more difficult for the sellers to offer new services or to give price concessions in response to market forces.[29] (The Commission had previously found that most regulatory challenges to the tariffs of nondominant carriers were brought by competitors, not by consumers.[30]) Requiring the many small carriers and resellers to file tariffs would impose inordinate cost burdens and discourage entry.[31] The Commission concluded that requiring nondominant carriers to file tariffs, far from helping consumers, would facilitate collusive pricing by the carriers.[32]

Under *Chevron*, these conclusions are entitled to judicial deference. The Commission's interpretation of section 203(b)(2) "represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Chevron*, 467 U.S. at 865 (citations omitted).[33] Far from irrelevant to the statutory inquiry, as the court below evidently thought they were, the Commission's findings confirm the reasonableness of its interpretation of its organic statute. There was no room under *Chevron* for the court below to ignore the Commission's findings and substitute its own interpretation of the Act for the reasonable interpretation by the agency.

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[29] *See Rulemaking Order*, Pet. App. B at 27a (*citing Competitive Carrier Second Report*, 91 F.C.C.2d at 62).

[30] *Competitive Carrier Notice*, 77 F.C.C.2d 308, 314 (1979).

[31] *See Rulemaking Order*, Pet. App. B at 27a (*citing Competitive Carrier Second Report*, 91 F.C.C. 2d at 65).

[32] *See id.* (citing *Competitive Carrier Fourth Report*, 95 F.C.C.2d at 556). This Court has similarly found that the advance publication of prices in a fledgling market "tends toward price uniformity" and competitive stagnation. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

[33] *See also Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) (stating that resolving ambiguous statutory text "is often more a question of policy than law") (citing *Chevron*, 467 U.S. at 866; Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2085-88 (1990)).

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

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Respondents.

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BRIEF *AMICI CURIAE* OF THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION, THE NEW YORK CLEARING HOUSE ASSOCIATION, THE SECURITIES INDUSTRY ASSOCIATION, VISA, U.S.A., INC. AND THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE IN SUPPORT OF PETITIONERS

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BRIEF AMICI CURIAE OF THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION, THE NEW YORK CLEARING HOUSE ASSOCIATION, THE SECURITIES INDUSTRY ASSOCIATION, VISA, U.S.A., INC. AND THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

This case raises the issue of whether the Federal Communications Commission ("Commission") has authority to

modify the tariff-filing requirements of the Communications Act of 1934 by relieving carriers that lack market power of the filing obligation with respect to some of their services. The Commission has adopted such a policy on the grounds that it would, among other things, "de-facilitate" price collusion among the major carriers in the highly concentrated market for interexchange telecommunications services. This brief is filed, with the written consent of the parties, on behalf of the associations listed below.

Amici are associations of large users of the telecommunications services of the major interexchange carriers (AT&T, MCI and U.S. Sprint). The California Bankers Clearing House Association and the New York Clearing House Association are associations of the leading (and largest) banks in California and New York, respectively. They serve as clearinghouses through which their members settle accounts and present checks and other payment instruments; they also represent their members on issues of common concern. The Securities Industry Association is an association of over 600 securities firms in the United States and Canada. VISA, U.S.A., Inc. is an association of some 20,000 financial institutions that use the VISA service mark in connection with payment systems (including debit and credit cards), check authorizations, automated teller machines and related services. The Ad Hoc Telecommunications Committee is an unincorporated trade association whose members include some of the nation's largest business users of telecommunications services and products; the organization represents its members' interests in telecommunications matters before the Commission and in the federal courts.

Amici and/or their members have entered into multi-year, multi-million-dollar service agreements with carriers that, pursuant to the Commission's challenged policy, do not file

tariffs for all of their services. Others have similar arrangements with AT&T, which is the only interexchange carrier currently excluded from the Commission's "detariffing" policy. Still others have arrangements with more than one carrier. All have a keen interest in the competitiveness of the interstate interexchange market, and submit this brief in order to offer a perspective on the Commission's policy — its value in deterring collusive pricing by the three major vendors in a highly concentrated market — that neither Petitioners nor Respondents are certain to present.

STATEMENT OF THE CASE

The last seven years have witnessed a substantial increase in competition in the market for interstate interexchange services.[1] Large users — including corporations, governments and non-profit institutions — have benefited from this phenomenon through lower rates and a greater willingness on the part of interexchange carriers to tailor their offerings to meet unique customer needs. A key reason for this increased competitiveness and responsiveness has been the Commission's policy permitting certain carriers to conduct business on an off-tariff basis.

Prior to 1985, even the largest users purchased virtually all of their interstate telecommunications services at the prices listed in tariffs filed by carriers with the Commission. After

[1] "Interexchange" services are those that involve the carriage of calls between different local telephone exchanges. Such services are commonly called "long distance" services. The Commission's detariffing policy applies to all non-dominant carriers, *i.e.*, those that lack market power. Membership in that category has expanded as competitors have emerged to challenge monopoly providers in markets for services other than interexchange, such as the local exchange market. While this brief focuses on the interexchange market, its analysis is equally applicable to the detariffing policy generally.

the Commission began issuing orders in its *Competitive Carrier* proceeding in the early 1980's,[2] large users began to purchase interexchange services on an off-tariff basis from the newly emergent interexchange carriers, notably MCI and Sprint. Six years ago this trend took a new turn as AT&T reacted to the inroads being made by its principal competitors and began to offer large users the opportunity to negotiate customized service arrangements, initially under its F.C.C. Tariff No. 12, and later through several other tariffs.[3]

Despite the Commission's adoption of a detariffing policy, MCI and Sprint have always offered most of their services pursuant to tariff.[4] They have opted, however, to take advantage of the Commission's detariffing policy when structuring custom network service agreements. Today, large customers commonly solicit bids from one or more carriers (whether informally or by means of a detailed "request for proposal"),

[2]*See Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor ("Competitive Carrier"), First Report and Order*, 85 F.C.C.2d 1 (1980) (concluding that tariff-filing requirements should be lightened for carriers lacking market power); *Second Report and Order*, 91 F.C.C.2d 59 (1982), *recon. denied* 93 F.C.C.2d 54 (1983) (making tariff-filing optional for resellers who do not own facilities); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983) (extending permissive detariffing to non-dominant facilities-based carriers). The Commission order at issue in this case is a reaffirmation of those policies, based upon a comprehensive analysis by the Commission of its authority in light of the evolution of the industry in the intervening years.

[3]These arrangements generally include services to meet all or most of the customer's needs, *e.g.*, switched services for voice communications (outbound and inbound ("800"), domestic and international), private lines to link corporate business locations and data centers and the local access services that connect the customer to the carrier's interexchange network. They typically include network management, and may also include calling card, videoconferencing and other services.

[4]Indeed, MCI successfully opposed a Commission attempt to *forbid* non-dominant carriers from filing tariffs at all. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

work with the bidders to improve their offers, and award the business based upon an analysis of the "best and final" offer of each. This can be a hotly contested process, yielding competitive prices and hitherto unavailable features that meet the unique needs of individual customers.[5] By the end of 1993, AT&T alone had nearly 1000 negotiated service arrangements in place, and MCI and Sprint between them had 500-1000 more. Most high-volume users now purchase interexchange service in this manner.

As AT&T's competitors have matured, they have won the confidence of an increasing number of large customers, making negotiated service arrangements the most competitive segment of the interstate interexchange marketplace.[6] This is also the arena in which AT&T's tariffed services compete directly with the detariffed services of its major competitors.

SUMMARY OF ARGUMENT

The Communications Act requires every common carrier to file tariffs for its services, but grants the Commission discretion to modify that requirement "for good cause shown." Over

[5]Such features include, for example, rate structures adapted to the customer's needs. A customer that uses a large number of very short calls to validate credit cards for retail merchants would prefer one-second (rather than 18- or 6-second) pricing units for 800 service. A customer for whom the uninterrupted flow of data is a critical business need may want a carrier to participate in developing, testing and executing disaster recovery plans and may further want the right to specific and effective remedies for lengthy or repeated service failures at key business locations. Some features that were first negotiated by customers in this highly competitive segment of the market have found their way into the carriers' general tariffs where other customers may take advantage of them. *See, e.g.*, AT&T Communications Tariff F.C.C. No. 2, § 2.6.5 (guaranteeing alternative routing for 800 service outages).

[6]*Competition in the Interstate Interexchange Marketplace, Report and Order*, 6 F.C.C. Rcd 5880, 5887 (1991), *recon.*, 6 F.C.C. Rcd 7569 (1991), *further recon.*, 7 F.C.C. Rcd 2677 (1992), *Notice of Proposed Rulemaking*, 5 F.C.C. Rcd 2627, 2634-35 (1990).

a decade ago, the Commission did precisely that, adopting a policy of permissive detariffing for some of the services of non-dominant carriers. The record before the agency demonstrated that such a policy would encourage the rapid development and deployment of new services, and put downward pressure on rates by enhancing competition in the market for interstate telecommunications services. In particular, the Commission found that off-tariff pricing would discourage implicit price collusion among the three carriers whose collective share of the market for interexchange telecommunications services approaches 90%.

The Commission adopted a policy of permissive detariffing for non-dominant carriers over a decade ago and recently reaffirmed the lawfulness and the wisdom of that determination. Because the policy is consistent with the Act, *amici* urge the Court to reverse the June 4, 1993 judgment of the U.S. Court of Appeals for the District of Columbia Circuit summarily reversing the Commission's order in *Tariff Filing Requirements for Interstate Common Carriers, Report and Order*, 7 F.C.C. Rcd 8072 (1992), *stayed*, 7 F.C.C. Rcd 7989 (1992) (*"1992 Report and Order"*). *American Tel. & Tel. v. FCC*, No. 92-1628 (D.C. Cir. June 4, 1993).

ARGUMENT

The Communications Act, adopted 60 years ago, generally contemplates a scheme in which carriers publish tariffs for their common carrier offerings and may charge neither more nor less for those services than the rates set forth in those tariffs. 47 U.S.C. § 203(a), (c). It also authorizes the Commission to "modify any requirement made by . . . this section . . . ." 47 U.S.C. § 203(b)(2). Subsection 203(b)(2) further states that the Commission may exercise this discretion only "for good cause shown," and permits the Commission to do

so "either in particular instances or by general order applicable to special circumstances or conditions . . . ." The only statutory limit on the exercise of the Commission's discretion is that the agency may not extend the notice period for tariff filings beyond 120 days.

The Commission has interpreted its authority under Section 203(b)(2) to permit the adoption of a detariffing policy applicable to common carriers lacking market power. A "well-settled principle of federal law" requires judicial "deference to reasonable interpretations by an agency of a statute that it administers." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, ___ U.S. ___, 112 S. Ct. 1394, 1401 (1992). Under that principle, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Indeed, where Congress has not itself addressed "the precise question at issue," the courts must affirm any reasonable agency interpretation. *Id.* at 842-43. Here, the Commission has repeatedly and with great care determined that it has the discretion to adapt the statutory tariff-filing requirement to a market whose evolving structure and conditions would have astonished the 73rd Congress which authored the Communications Act. It has also found that permissive detariffing would in fact further the fundamental purposes for which the statute was enacted. Analysis of the text of Section 203 and the context in which it must be applied compel the conclusion that the Commission was correct on both counts.

I. The Text Of Section 203 Supports The Commission's Authority To Permit Detariffing By Some Carriers Of Some Of Their Services.

The Commission's action in adopting the *1992 Report and Order* is consistent with its authority as set forth in Section 203(b)(2). The agency modified one of the requirements made "by . . . this section,"[7] *i.e.*, the requirement that "[e]very common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges for itself . . . for interstate and foreign wire or radio communication . . . ." 47 U.S.C. § 203(a). It did not abolish the tariff-filing requirement for *all* carriers or for *all* services, but determined that this requirement should apply only to *some* carriers (those lacking market power) and only for *some* services (domestic interstate services). *1992 Report and Order*, 7 F.C.C. Rcd at 8081 (App. B) (non-dominant carriers); *International Competitive Carrier Policies, Report and Order*, 102 F.C.C.2d 812, 843 (1985) (establishing tariff-filing rules for the international services of non-dominant carriers). It has taken this action "by general order applicable to special circumstances or conditions" and, as discussed more fully below, has done so "for good cause shown."[8]

[7]Congress could not have intended the reference to "this section" to refer only to Subsection 203(b)(2). We must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, ____ U.S. ____, 112 S. Ct. 1146, 1149 (1992). In light of the references elsewhere in the Communications Act to a particular "subsection," *see* 47 U.S.C. §§ 152(b); 155(c)(1), (2), (4), (7); 156(c); 158(a); 204(b); 221(a), Congress's failure to use similar language in Section 203(b)(2) is significant. Moreover, it would be nonsensical to assume that Congress intended to limit the modification power to only those requirements set forth in Subsection 203(b)(2) in light of the fact that Subsection 203(b)(2) contains no requirements at all. Because the substantive requirements of Section 203 lie entirely in Subsections (a) and (c), Congress could only have intended the modification power conferred by Subsection (b)(2) to pertain to those provisions.

At the heart of the issue before this Court is the meaning of the phrase "modify any requirement made by" as it is used in Section 203(b)(2). Section 203(a) sets forth the tariff-filing requirements in bare-bones terms: every carrier shall file and make public a schedule of its rates and the classifications, practices and regulations affecting them, including the effective date of each rate. The Commission's authority to "modify" any of those requirements must — if it means anything — mean that the Commission may permit a carrier to *not* file or *not* make public the listed information. Any narrower reading of the authority to "modify" would render Section 203(b)(2) a nullity because it would confer no authority on the Commission.

The decision that formed the basis for the Court of Appeals' June 4 order invalidating the Commission's detariffing policy was premised on just such a narrow reading. In *American Tel. & Tel. Co., v. FCC*, 978 F.2d 727, 736 (D.C. Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S. Ct. 3020 (1993), the court held that the word "modify" grants the Commission authority to make only "circumscribed alterations" in the require-

[8]Section 203(c) offers further support for the Commission's authority to act as it has done. It states that no carrier, "unless otherwise provided by or under authority of this chapter," shall offer service unless it has filed a tariff consistent with the statute and applicable regulations. On its face, this language contemplates the possibility that some carriers may be relieved of the obligation of filing tariffs in at least some circumstances. If Congress intended this to refer only to those cases where it had itself authorized off-tariff arrangements, *see, e.g.*, U.S.C. § 211 (authorizing carriers to do business with one another by contract), the phrase "or under authority of" in Section 203(c) would be mere surplusage, a construction that should be avoided where possible. The only conceivable purpose of the phrase is to acknowledge the discretion granted the Commission in Section 203(b)(2) to permit detariffing of some carriers, who then would not be barred from offering service without first having filed and published tariffs.

ments of Section 203, and does not authorize the agency to permit any carrier to operate without a tariff. However valid the court's exegesis of the word "modify" may be when viewed in isolation, it leads to a construction of Section 203(b)(2) that, for the reasons stated above, would effectively revoke the authority that Congress granted.[9]

Opponents of permissive detariffing assert that this Court's decision in *Maislin Inaus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S. Ct. 2759 (1990) (*"Maislin"*) forecloses the Commission's reliance on its Section 203(b)(2) discretion to support the detariffing policy. *See* AT&T's Brief in Opposition at 9-12 (filed in Nos. 93-356, 93-521). But, even if *Maislin* is read as limiting the authority of the Interstate Commerce Commission ("ICC") to permit some carriers to operate without filing tariffs, the Federal Communications Commission is not similarly limited, because its organic act differs from this Interstate Commerce Act in a crucial respect.

Maislin follows a prior ruling by the Court of Appeals for the District of Columbia Circuit concerning the requirements to which the ICC's discretion to "change" statutory requirements may be applied. In *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986) (Scalia, J.), the court held that the ICC's authority to "change" statutory requirements — conferred by Section 10762(d)(1) of the Interstate Commerce Act — extends only to the requirements contained in Section 10762, and *not* to those set

[9]The Court of Appeals' analysis would hold with respect to the details of tariff-filing—the amount of information to be included in tariffs, their form and so on—which are arguably susceptible to "circumscribed alteration." But the statute provides that those details are to be spelled out "under authority of" Section 203(a), not "by" Section 203(a).

forth in Section 10761.[10] The filed rate doctrine that the agency had sought to "change" in the policy struck down in *Maislin* appears in the latter section and was not, therefore, within the agency's discretion to "change." The ICC policy at issue in *Maislin* purported to waive carrier compliance with both sections, and this Court agreed that the ICC had no power to avoid the application of Section 10761. 110 S. Ct. at 2768-69. In contrast, the Federal Communications Commission's authority to "modify" extends to "any requirement made by . . . this Section," which manifestly includes the requirement that the detariffing policy purports to modify.[11]

II. The Commission Reasonably Concluded That The Permissive Detariffing Policy Serves The Purposes Of The Communications Act.

The Commission's authority to modify the Communications Act's tariff-filing requirements is conditioned upon a finding of "good cause." 47 U.S.C. § 203(b)(2). That condition does not exist in a vacuum and should be construed to permit agency action that furthers the purposes of the statute. Congress identified those purposes with clarity, stating that the goal of the

[10]The Court of Appeals noted that Section 10761 has its own (rather narrow) waiver provision, which would have been superfluous if the discretion conferred by Section 10762(d)(1) were construed to apply to that Section. 793 F.2d at 379. Section 203(a) of the Communications Act has no analogous feature.

[11]Section 203 of the Communications Act is broader than either Section 10761 or Section 10762 of the Interstate Commerce Act and contains the analogs of both provisions. *Compare* 47 U.S.C. § 203 *with* 49 U.S.C. §§ 10761, 10762. The power of the Federal Communications Commission to modify any requirement of Section 203 is, therefore, greater than the authority of the ICC to change any requirement of Section 10762. Although some may seek to minimize the distinction between the discretion conferred on these two agencies, *see* AT&T's Brief in Opposition at 12, such arguments are at base a quarrel with *Regular Common Carrier Conference* and say nothing about the proper construction of the Communications Act.

regulatory scheme is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. *See generally United States v. Southwestern Cable Co., Inc.*, 392 U.S. 157, 167-8, 173 (1968) (Communications Act gives Commission "a comprehensive mandate" with "expansive powers"), *quoting National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

Cognizant of its mission, the Commission has determined that relieving non-dominant carriers of the obligation to file tariffs for their domestic interstate services will "further[ ] the statutory purposes of the Communications Act." *1992 Report and Order*, 7 F.C.C. Rcd at 8078.[12] It cited several reasons why detariffing enhances competition and, conversely, why abandonment of this policy would frustrate the Act's purposes: tariff-filing by non-dominant carriers would provide a disincentive for innovation, inhibit price competition and discourage new entrants. *Id.* at 8079 & n.111. Citing more than a decade's experience, the Commission reaffirmed that detariffing "'eliminates a potential vehicle for collusive conduct and facilitates price discounting' and, therefore, serves the public interest better than streamlined regulation." *Id.* at 8080 n.118. Without prejudice to the other interests served by detariffing, *amici* here focus their attention on this last consideration.

[12]In contrast, the Commission has determined that tariff filing requirements serve purposes that outweigh their disadvantages with respect to carriers that *do* have market power, *i.e.*, where most consumers lack competitive alternatives. *1992 Report and Order* at 8073; *Competitive Carrier, First Report and Order*, 85 F.C.C.2d at 20-22. In addition, the Commission has determined that all carriers—dominant and non-dominant—must file tariffs for their international services. *International Competitive Carrier Policies, Report and Order*, 102 F.C.C.2d at 843.

A. The Commission Has Long Recognized That Published Tariffs Pose A Risk Of Collusive Pricing Activity.

In proceedings other than the rulemaking at issue here, the Commission has been repeatedly confronted with the fact that tariffs do not necessarily ensure just and reasonable rates.[13] On the contrary, they permit carriers to monitor one another's rates, mimicking each other's decreases and increases and fostering the widely recognized practice of AT&T's competitors of pricing just below AT&T's rates. The risk of such "umbrella pricing" was among the reasons the agency gave for adopting detariffing more than a decade ago. *Competitive Carrier, Fourth Report and Order*, 95 F.C.C. 2d at 580; *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C. 2d 308, 313-14, 358-59 (1979).

In 1990-91, the Commission undertook a comprehensive examination of the state of competition in various segments of the interstate interexchange marketplace. In *Competition in the Interstate Interexchange Marketplace, Report and Order, supra*, the agency took three steps to adapt its regulatory policies to the current realities of the marketplace. All of them sought to reduce the risk of anticompetitive activity. First, the Commission reduced the 30-to-45-day notice period for AT&T tariff filings, stating that advance notice of price changes "foster[s] a reactive market, rather than a proactive one, and reduce[s] incentives for AT&T's competitors to 'stay on their

[13]The ICC has reached a similar conclusion. *See, e.g., Water Transport Ass'n v. ICC*, 722 F.2d 1025, 1032 (2d Cir. 1983) (finding that disclosure of contract terms "can undermine competition by stabilizing prices at an artificially high level"); *Western Fuels-Illinois, Inc. v. ICC*, 878 F.2d 1025 (7th Cir. 1989).

competitive toes.''' *Id.* at 5895.[14] Second, it adopted rules permitting all interexchange carriers, dominant and non-dominant, to negotiate discounted rates for most services, based upon the Commission's finding that this ''contract carriage'' would ''minimize the risk that tacit collusion will occur.'' *Id.* at 5899.[15] Third, the Commission sought to minimize the information that must be filed by the dominant carrier with respect to its contract carriage arrangements in order to avoid the disclosure of information that might increase the risk of tacit collusion. *Id.* at 5902. The agency's concerns about collusion between AT&T and its competitors were tempered by the fact that AT&T's competitors were not tariffing their agreements to serve the high-end business services market, making it easier for them to ''cheat'' on any implicit understandings about price levels and differentials.[16]

In a still more recent proceeding, the Commission again concluded that traditional tariffing by non-dominant carriers inhibits price competition. In the aftermath of the 1992 decision of the U.S. Court of Appeals for the District of Columbia Circuit in *American Tel. & Tel. Co. v. FCC, supra*, the Commission reluctantly set out to develop mandatory tariff filing

[14]Where non-dominant carriers elect to file tariffs for domestic services, the applicable notice period is short. 47 C.F.R. § 61.23(c) (as amended by *Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order*, 8 F.C.C. Rcd 6752 (1993)) (one day for most filings), § 61.58(c)(6) (14 days for contract tariffs).

[15]The Department of Justice had told the Commission that contract carriage would reduce the likelihood that AT&T's competitors would—as part of a scheme of tacit collusion—price their services just under AT&T's announced ''umbrella'' price rather than with reference to their own costs. Reply Comments of the United States Department of Justice, CC Docket 90-132, filed September 28, 1990, at pp. 41, 44-46. *See also* National Economic Research Associates, Inc. Study (submitted in CC Docket 90-132 as an ex parte filing made by AT&T on May 15, 1991) at 69 (citing ''umbrella pricing'' as a user concern).

[16]*See Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking*, 5 F.C.C. Rcd at 2639-40.

requirements for non-dominant carriers. Once again, the agency found that ''traditional tariff regulation of nondominant carriers . . . is actually counterproductive since it can inhibit price competition, service innovation, entry into the market, and the ability of carriers to respond quickly to market trends.'' *Tariff Filing Requirements for Nondominant Carriers, Memorandum Opinion and Order*, 8 F.C.C.Rcd at 6752 (footnotes omitted). The agency streamlined its rules for such carriers in the cited order, which is now on appeal. *sub nom. Southwestern Bell Corp. v. FCC*, No. 93-1562 (D.C. Cir.).

B. The Commission's Concerns About Collusive Pricing For Tariffed Services Are Well-Founded.

The Commission findings discussed above reflect the remarkably parallel pricing behavior over the last several years of the three major interexchange carriers for tariffed services.[17] Figure ''A'' illustrates the cost per minute paid under

[17]The trend—which has affected private line as well as switched services—has not escaped the notice of the telecommunications trade press. *MCI, Sprint Match AT&T's Across-the-Board Rate Increase*, TELECOMMUNICATIONS REPORTS, Aug. 2, 1993 at 34; *Rate Hikes: MCI, Sprint Follow AT&T's Lead*, COMMUNICATIONSWEEK, Aug. 9, 1993 at 60; *MCI, Sprint Again Follow AT&T's Pricing Lead*, TELECOMMUNICATIONS REPORTS, Oct. 4, 1993 at 32; *MCI, Sprint Match AT&T's Consumer Rate Increase Again*, TELECOMMUNICATIONS REPORTS, Dec. 6, 1993 at 12 (''Spokesmen for MCI and Sprint both acknowledged that their proposed rate revisions 'closely parallel' AT&T's latest increases.''). *See also* E. Andrews, *Long Distance Big 3 Emerge From Price Wars as Winners*, THE N.Y. TIMES, July 23, 1993 at D-1, col. 4 (''After years of brutal price wars, the once viciously competitive long distance telephone business is turning into a surprisingly cozy and profitable industry.'') The July-August rate increases followed by days announcements of healthy second quarter profits, while the November-December increases came several weeks after similar third quarter reports. *See* J.J. Keller, *AT&T Reports 8.6% Profit Increase in 2nd Period; Management Shift Made*, THE WALL ST. J., July 23, 1993 at A-2, col 2; A. Ramirez, *AT&T and MCI Show Increases in Net Income*, THE N.Y. TIMES, Oct. 22, 1993 at D-5, col. 3.

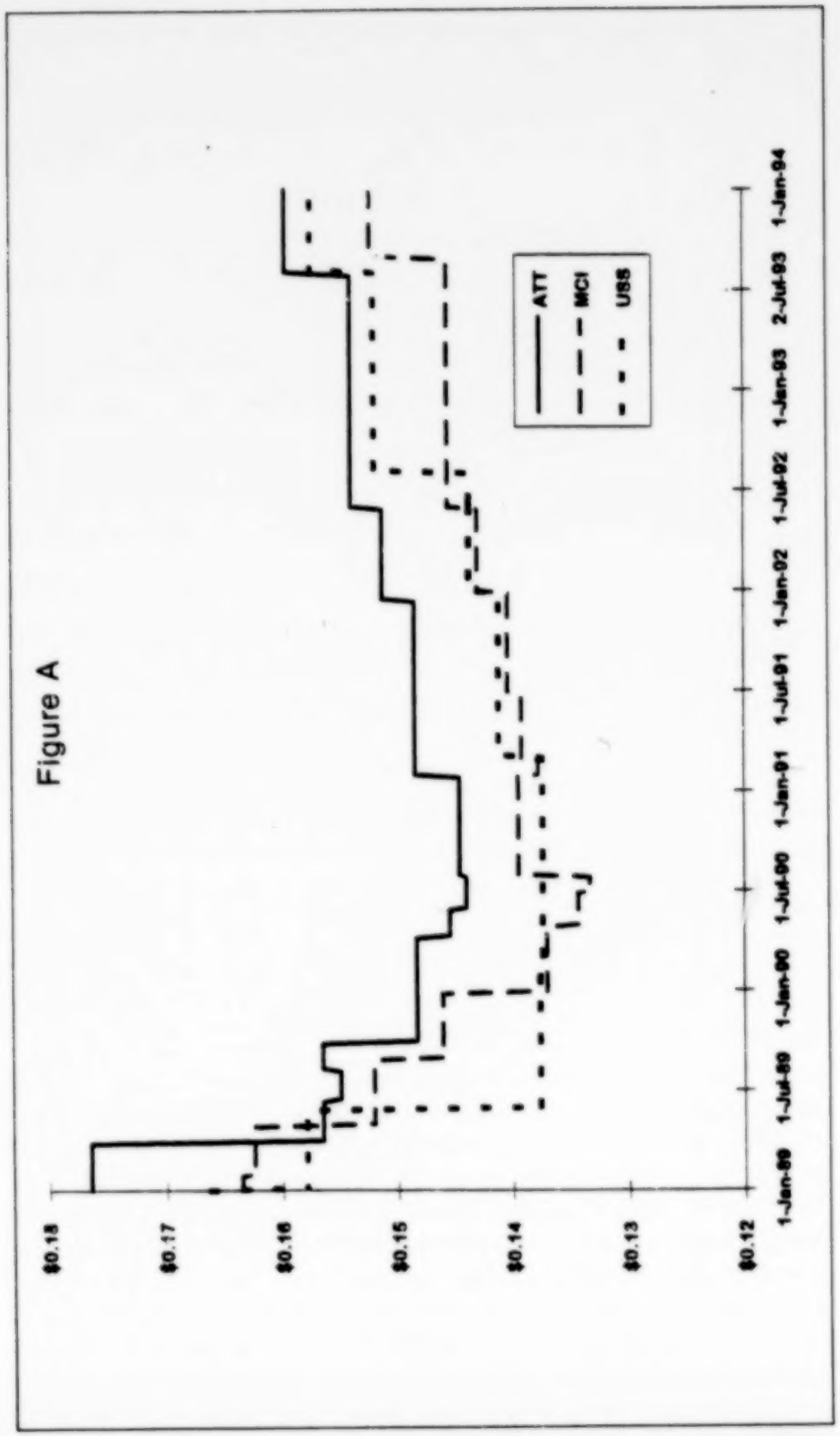

Figure A

published tariffs for switched voice services. The prices were calculated based upon the most favorable term plan for which a hypothetical, mid-sized business customer qualified.[18]

Mere parallelism does not prove that the carriers are engaged in an unlawful conspiracy, nor is it the aim of *amici* to make such a case. Nonetheless, both the Commission and the Department of Justice have identified factors in the telecommunications services industry that operate as what Professor Areeda calls "facilitating practices," which tend to increase the likelihood of anticompetitive activity.[19]

The costs of constructing a network of telecommunications transmission and switching facilities erect substantial entry barriers in this industry. *See Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking*, 5 F.C.C. at 2628. The Department of Justice has concluded that additional entry into the interstate interexchange market by facilities-based carriers is unlikely because of the considerable capital costs involved and because the large economies of scale may permit the survival of only a relatively few firms. Department of Justice, Reply, filed in CC Docket 90-132, at p. 30 ("DOJ Reply").[20]

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[18]This data was compiled by Michael T. Hills, Ph.D., from the tariffs filed at the Commission by the named carriers for multi-location customers making 36-month service commitments and purchasing 1,000 hours of calling per month. The chart reflecting rates through 1992 was first published in *Network Services Update*, BUSINESS COMMUNICATIONS REVIEW, Feb. 1993, at 16-23. The chart reproduced in this brief will appear in the February 1994 issue of that publication.

[19]Professor Areeda defines "'facilitating' [as any] practice that eases tacit coordination among competitors and makes supra-competitive pricing somewhat more likely." 6 P. Areeda, Antitrust Law ¶ 1436e (1986).

[20]The Commission is not itself charged with enforcement of the antitrust laws as such. *See United States v. Radio Corp. of America*, 358 U.S. 334, 346 (1959). Nonetheless, antitrust considerations have long been held to be a legitimate concern for the agency. *See FCC v. National Citizens*

In addition, the three largest interexchange carriers account for some 90% of the market for those services.[21] The Department of Justice has concluded that AT&T, MCI and Sprint have sufficient market share among them to "suggest that the 'large business services' market is highly concentrated . . . under the type of HHI analysis used in the Department's Merger Guidelines . . . ." DOJ Reply at p. 28 n.46. Such high levels of concentration make the market particularly susceptible to collusion, express or tacit, as the Court recognized in *United States v. Container Corp. of America*, 393 U.S. 333, 336-37 (1969) (competitors accounting for 90% of the market). The interexchange telecommunications services market is also characterized by other factors generally believed to facilitate collusion, including a diffuse market on the buyers' side, significant economies of scale and relatively standardized products. *See, e.g.*, H. Hovenkamp, ECONOMICS AND FEDERAL ANTITRUST LAW 100 (1985); R. Posner, *Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare*, 28 STAN. L. REV. 903, 906 nn. 10 and 11 (1976); R. Posner and F. Easterbrook, ANTITRUST 336-340 (2d ed. 1981).

In such an environment, the exchange of detailed pricing information among competitors has repeatedly been found to be an especially effective tool for the formation and preserva-

Comm. for Broadcasting, 436 U.S. 775, 795-96 (1978) and cases cited therein. The Department of Justice *is* an antitrust enforcement agency, and its views on these issues should be accorded appropriate weight.

[21]The most recent analysis released by the Commission shows that the three major carriers took in 85-86% of all toll revenues reported to the Commission and to shareholders in the Third Quarter of 1993 and account for 93.6% of all presubscribed customer access lines in that same period. A substantial share of the 14-15% of the toll revenues not earned by AT&T, MCI and Sprint were earned by carriers that do not own their own facilities but resell services purchased from the major carriers. Federal Communications Commission, Industry Analysis Division, *Long Distance Market Shares, Third Quarter 1993*, Tables 4-6 (Dec. 1992).

tion of cartels, enabling them both to maintain supra-competitive prices and to detect and punish cheating by their members. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16, 426 (1978) (eight largest companies accounting for 94% of the market); *United States v. Container Corp. of America, supra; Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936); H. Hovenkamp, ECONOMICS AND FEDERAL ANTITRUST LAW, *supra* at 101 (exchange of price information one of the "most obvious" of collusion-facilitating practices); R. Posner, *Oligopolistic Pricing Suits, the Sherman Act and Economic Welfare, supra* at 906 n.10; *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 249-50 (1940); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921). Conversely, the ability of competitors to keep their prices secret from each other facilitates cheating and thereby hinders the development (or hastens the decline) of cartels. *See, e.g.*, R. Posner and F. Easterbrook, ANTITRUST, *supra*, at 199; I. Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295, 296, 300 (1987).

It was eminently reasonable for the Commission to conclude that, under the universal, mandatory tariff regime that would have existed if the agency had not adopted its detariffing policy — and that would prevail if the judgment of the Court of Appeals were upheld — information exchanges of the kind that foster collusive pricing would be encouraged. In particular:

- accurate current information about a competitor's price would be available and there would never be a need for action more furtive than a visit to the agency's Tariff Reference Room (open to the public, Monday — Friday, 1:30 — 4:30 p.m.) or a subscription to one of several tariff publishing services;

- price changes would be announced prior to their effective date, as Section 203(a) requires; and
- carriers would be required to adhere to the announced price, as Section 203(c) requires.[22]

Such practices, if undertaken by competitors on a voluntary basis, have been the basis for a finding of unlawful price fixing. *See Sugar Inst., Inc., supra* (refiners accounting for 70-80% of the market published their prices and agreed not to grant secret price concessions); *United States v. Socony-Vacuum Oil Co., supra*. *See also*, 6 P. Areeda, Antitrust Law ¶¶ 1434b (exchange of information), 1435d (advance announcement of price and price changes and adherence thereto), 1435g (exchange of manuals setting forth pricing methodologies). It is not surprising, then, that the Department of Justice has urged the Commission to minimize public disclosure of carriers' rates, observing that, "by preserving the confidentiality of a carrier's rates from its rivals, the Commission would deprive the carriers of the type of knowledge and confidence that facilitates pricing collusion or coordination." DOJ Reply at p. 45 (citations omitted).

The cumulative effect of "facilitating" factors reduces the likelihood that any carrier would undercut existing prices, and

[22]Commentators note that the dangers associated with posted prices are compounded if they are legally enforceable, since cartel members thereby have a risk-free means of punishing cheaters. *See* I. Ayres, *How Cartels Punish, supra* at 298; R. Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEORGETOWN L. REV. 1187 (1979). Section 203(c) constitutes just such an enforcement mechanism, requiring that, once a tariff is filed for a service, the carrier must charge all customers that tariffed rate. In contrast, where discounts from published prices are common, advance posting of non-discounted prices is less likely to facilitate price collusion. *See Reserve Supply Corp. v. Owens-Corning Fiber Glass Corp.*, 971 F.2d 37, 53 (7th Cir. 1992) (discounts off list price cited as a common industry practice).

casts suspicion on the obviously parallel movement of the major carriers' prices.[23] In such an environment, the Commission's detariffing policy has much the same effect as an injunction or cease and desist order addressed to a "collective facilitating practice" in the context of an antitrust enforcement action.

The Commission adopted its detariffing policy when competition was in its infancy. By any measure, the 10-year experiment has succeeded. The policy is in no small part responsible for the "robust competition in the interexchange market and the increased choices for customers with respect to carriers and prices." *1992 Report and Order*, 7 F.C.C. Rcd at 8079.[24] Although *amici* have concentrated in this brief on the deterrence of price collusion, we note that the detariffing policy has also served to foster service innovation, as the Commission anticipated. *1992 Report and Order*, 7 F.C.C. Rcd at 8079. For example, customers had long (and unsuccessfully) sought assistance from the interexchange carriers in detecting and preventing toll fraud, a problem that is estimated to account for $1-5 billion in losses annually.[25] Although they routinely monitored their own networks for abnormal calling patterns, neither AT&T, MCI nor Sprint would take responsibility for informing customers of suspected fraud or guaranteeing to block calls at the customer's request. Finally, one carrier broke ranks and offered a non-tariffed program that included monitor-

[23]*See* 6 P. Areeda, ANTITRUST LAW ¶ 1435b.

[24]Millions of business and residential customers today buy services from second- and third-tier non-dominant carriers operating without tariffs. Other than in the payphone area, no statutory or regulatory action has been necessary to protect consumers against unjust, unreasonable or unlawfully discriminatory rates. *See* Telephone Operator Consumer Services Improvement Act of 1990, *codified at* 47 U.S.C. § 226.

[25]*See, e.g., Policy and Rules Concerning Toll Fraud, Notice of Proposed Rulemaking*, FCC 93-496, CC Docket No. 93-292 (released Dec. 2, 1993) at ¶ 4.

ing, reporting and call-blocking guarantees. Other carriers, including AT&T, soon followed. While other factors may also have been at play with respect to toll fraud, and the maverick carrier later tariffed its program, there is no question but that the detariffing policy "de-facilitated" the carriers' parallel efforts to stifle service innovation.[26]

A decision by this Court to uphold the judgment of the Court of Appeals invalidating the detariffing policy would frustrate the goals of the Communications Act and slow the further evolution of competition. It would also hamper the Commission in its ability to respond to the shifting alliances of technology companies and the convergence of old and new technologies that now characterize the industry today. The impact that these developments will have on factors such as market entry and concentration is uncertain. But Congress has charged the Commission with determining how best to modify the requirements of Section 203(a) of the Communications Act, and the Act should not be construed in a manner that would tie the agency's hands.

[26]The rapid pace of innovation in the non-tariffed features of custom network service agreements underscores the point. Carrier network management services, a common feature of such agreements, *see* note 3 *supra*, has evolved to a point where many customers turn over to the carriers key responsibilities that they had previously performed for themselves. The carriers' willingness to take on responsibilities for managing these complex networks and the diversity of terms offered by them has been encouraged by the fact that the terms governing network management are not tariffed. This contrasts sharply with the product standardization that is typical of cartels in which product information is exchanged. *See, e.g.*, H. Hovenkamp, ECONOMICS AND FEDERAL ANTITRUST LAW, *supra* at 100; R. Posner and F. Easterbrook, ANTITRUST, *supra* at 337.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and its order vacated.

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Petitioner,
v.
AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,
v.
AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* WILTEL, INC., *ET AL.*, IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-356

MCI TELECOMMUNICATIONS, INC.,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

No. 93-521

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* WILTEL, INC., *ET AL.*, IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici WilTel, Inc., LDDS Communications, Inc. d/b/a LDDS Metromedia Communications, Cable & Wireless, Inc., Chadwick Telecommunications Corp., American Network Exchange, Inc., KLP, Inc. d/b/a Call America, U.S. Long Distance, Inc., Consolidated Network, Inc., Capital Network System, Inc., Impact Telecommunications Corp., LCI International, Inc., One-2-One Communications, Inc., and Telephone Electronics Corp. are long

distance telephone companies of varying size. All of these companies are considered non-dominant interexchange carriers by the Federal Communications Commission, and accordingly were not required to file and maintain tariffs with the Commission prior to the decision below. *Amicus* America's Carriers Telecommunications Association is a trade association representing non-dominant long distance carriers. *Amicus* MFS Communications Company is a competitive local exchange carrier in the emerging market for alternatives to the local telephone company monopolies, and also was not required to file tariffs prior to the decision below.

Under the court of appeals decision, *amici* would be required to file tariffs with the Federal Communications Commission. This requirement would not only result in added financial burdens on *amici*, but would also be detrimental to the viability and further development of telecommunications competition. *Amici* therefore have a direct stake in the outcome of this case, which is of far-reaching significance to the entire telecommunications industry. This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises from a decision of the Court of Appeals for the District of Columbia Circuit invalidating the longstanding permissive detariffing policy of the Federal Communications Commission ("FCC" or "Commission"). The court of appeals found that this policy, which the FCC has characterized as "one of the cornerstones" of its regulation of developing telecommunications competition (Pet. App. 65a),[1] violated Section 203 of the Communi-

[1] Citations to "Pet. App." are to the Appendix to the Petition for Writ of Certiorari in No. 93-356. Unless otherwise indicated, citations to FCC orders and notices are citations to such items in CC Docket No. 79-252, *Policy & Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor* ("*Competitive Carrier Rulemaking*").

cations Act of 1934, as amended ("the Communications Act" or "the Act"), 47 U.S.C. § 203.

More specifically, this case has developed out of the FCC's *Competitive Carrier Rulemaking*, a multi-staged proceeding between 1979 and 1985 that established regulatory policies to govern new competitors entering heretofore monopoly telecommunications markets. Over 13 years ago the FCC concluded that the rates of such "non-dominant" carriers are presumptively lawful because they "simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene" applicable sections of the Communications Act. *See First Report and Order*, 85 F.C.C.2d 1, 31 (1980).[2] No party sought review of that decision, or the reduced tariff regulation that the FCC adopted to implement it. Two years later the FCC reaffirmed its conclusion regarding the presumptive lawfulness of non-dominant carrier rates based on its expert review of subsequent events in the market. The Commission then found that tariff regulation of such carriers was unnecessary and granted permissive detariffing to resale carriers. *See Second Report and Order*, 91 F.C.C.2d at 64-71. The next year the FCC extended permissive detariffing to other non-dominant car-

[2] In its 1979 *Notice of Inquiry and Proposed Rulemaking*, the Commission announced its "tentative belief that competitive carrier rates are highly unlikely to contravene the Act." 77 F.C.C.2d 308, 310. The Commission reasoned that under widely accepted economic theory "the rates of non-dominant carriers are unlikely to be either predatory or supra-competitive and thus are unlikely to contravene" the proscription of 47 U.S.C. § 201(b) on unjust and unreasonable rates. *Id.* at 334. Likewise, "these same factors preclude these [non-dominant] carriers from unjustly discriminating in favor of some customers at the expense of their other customers," *id.* at 337, in violation of the Act's prohibition on "unjust or unreasonable discrimination in rates." 47 U.S.C. § 202(a). The Commission has repeatedly endorsed these conclusions. *See, e.g., First Report and Order*, 85 F.C.C.2d at 5, 20; *Second Report and Order*, 91 F.C.C.2d 59, 69 (1982); *Fourth Report and Order*, 95 F.C.C.2d 554, 577-578 (1983); *Fifth Report and Order*, 98 F.C.C.2d 1191, 1199-1202, 1207-08 (1984).

riers. *See Fourth Report and Order*, 95 F.C.C.2d at 578.[3] No party sought review of any of these Commission decisions.

Thus, for well over a decade it has been a black letter principle that non-dominant carrier rates, terms and other service conditions are presumptively lawful. This principle is not before the Court today; indeed, it has never been challenged.

The only issue here is whether the FCC's authority to modify any requirement of Section 203 of the Act is sufficient to allow the Commission to excuse hundreds of non-dominant carriers from filing tariffs that the Commission has already held are presumptively lawful. The D.C. Circuit answered that question in the negative, and the question is now before this Court on review.

SUMMARY OF ARGUMENT

This case goes directly to the heart of the FCC's ability to regulate developing telecommunications competition at a time of great ferment in the industry. The court of appeals has stripped the FCC of a crucial tool—clearly entrusted to the Commission by the Communications Act—by which it fosters competition.

The court of appeals read the plain meaning of Section 203(b)(2) too narrowly when it found that the express grant of authority to "modify any requirement" of Section 203 did not give the FCC the flexibility to adopt permissive detariffing. This plain meaning is supported both by the specific language of Section 203, the language and structure of other parts of the Act, and subsequent congressional action. Because the Commission's understanding of the statute it administers is demonstrably correct, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously ex-

[3] At that time the FCC noted that over the preceding three years it had received only five petitions challenging tariff filings of "specialized" (*i.e.*, new) common carriers such as MCI, and that none of the petitions had merit. See 95 F.C.C.2d at 578 n.79.

pressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Should the Court find Section 203 ambiguous or unclear on the question presented, it is plain at a minimum that the Commission's construction of this provision is a permissible one. The D.C. Circuit below failed to defer to the FCC's reasonable interpretation of its governing statute as required by *Chevron*. Had it done so, it would have found that the language of the Communications Act amply supports the FCC's decision to excuse non-dominant carriers from filing tariffs.

Permissive detariffing is supported, not only by Section 203, but by the FCC's expert and reasonable understanding of the broader purposes of the Act—and the complex industry conditions in which it applies. Section 1 of the Act gives the FCC a broad mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. § 151.

The FCC determined nearly two decades ago that competition can help meet these objectives. The *amici* here owe their existence to that decision. But the challenge of a transition from monopoly to competitive markets cannot be overstated. Even today AT&T's long distance market share is over 60%, three times greater than that of even its largest rival. Equally important, competition with local telephone companies is only now beginning. The FCC had just taken its first major steps to encourage such competition when the D.C. Circuit invalidated the permissive detariffing policy.

The court of appeals struck down one of the most important tools used by the FCC to manage competitive market development. The flexibility provided by Section 203 of the Act allows the FCC to avoid harmful and unnecessary tariff regulation of developing competitors—

regulation that the Commission has found could prevent competition from taking root in the face of the market power of preexisting monopolies. The Commission then has used this same flexibility gradually to reduce regulation of the dominant monopoly as market competition grows.

Significantly, the Commission long ago found that the rates charged by non-dominant competitors are presumptively lawful under the Act because those carriers lack market power. Indeed, the Commission made tariff filing permissive only after it reaffirmed, based on further experience, that non-dominant carrier rates should continue to be considered presumptively lawful. No party has ever challenged this substantive conclusion.

The only issue here, then, is whether Section 203 should be given a constricted reading so as to require the filing of rates that the Commission has already found presumptively lawful, even though such a requirement would have harmful effects on users of telecommunications services and on the overall policy goals expressed in Section 1 of the Act. In these circumstances the Court should respect the language of Section 203, and restore to the Commission its full statutory authority to regulate competitive market development.

ARGUMENT

I. THE FCC'S PERMISSIVE DETARIFFING POLICY IS WELL WITHIN THE AUTHORITY DELEGATED TO THE COMMISSION IN SECTION 203

In holding that the Commission's authority to "modify any requirement" of Section 203 does not permit it to modify the tariff filing requirement, the court below rejected the agency's interpretation of the statute it administers. Remarkably, it did so without analyzing the agency's construction under the principles announced by this Court in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the seminal decision establishing the guidelines for analysis "[w]hen a court reviews an agency's construction of the statute which it administers * * *." *Id.* at 842.[4] Under that familiar analysis, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If, however, "the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute * * *. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

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[4] The D.C. Circuit's unpublished *per curiam* opinion below did not cite *Chevron* and relied exclusively on its opinion in *American Telephone & Telegraph Co.* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993). That opinion, in turn, mentions *Chevron* only to say that the court's 1985 decision in *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985)—which the D.C. Circuit found (incorrectly, we think) to be the ultimate source for the decision below—did not cite *Chevron*. Thus, although all of the tariffing decisions of the D.C. Circuit postdate this Court's decision in *Chevron*, that court has never analyzed Section 203 under *Chevron* principles.

The D.C. Circuit's failure to apply the teaching of *Chevron* was fundamental error. One of the primary effects of the approach mandated by this Court in *Chevron* is to ensure the appropriate distribution of authority in our federal system. As the Court observed in *Chevron* itself:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. [467 U.S. at 865-866.]

See also Pauley v. *Bethenergy Mines, Inc.* 111 S. Ct. 2524, 2534 (1991) (judicial deference mandated by *Chevron* "reflects a sensitivity to the proper roles of the judicial and political branches").[5] *Chevron's* allocation of the appropriate roles between the judiciary and the executive is not, however, merely a matter of political theory, for it also reflects the relative competence and expertise of the two branches. For this reason, the Court has found particular significance in the complexity of the statute at issue, and the expertise of the agency in administering it. *See, e.g., id.* (in the context of a "complex and highly technical regulatory program" requiring the application of "significant expertise" and "the exercise of judgment grounded in policy concerns, * * * courts appropriately defer to the agency entrusted by Congress to make such policy determinations").[6]

[5] *See also* Laurence H. Silberman, Chevron—*The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 822 (1990) (*Chevron* "is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary").

[6] Justice Scalia has explained that "one of [*Chevron's*] major advantages from the standpoint of governmental theory * * * is to permit needed flexibility, and appropriate political participation, in the administrative process." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 517 (1989). *See also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969, 1002 (1992) ("the practice of deferring to executive interpretations of statutes performs many valuable functions: it allows policy to be made by actors who are politically accountable; it draws upon the specialized knowledge of the administrators; it injects an element of flexibility into statutory interpretation; and it helps assure nationally uniform constructions"); Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2084 (1990) ("when agency competence is relevant, deference is particularly appropriate").

Long before the decision in *Chevron*, this Court recognized the need for particular deference to the Commission's judgments under the Communications Act. The Act, the Court observed, is a "supple instrument for the exercise of discretion by an expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). By its decision below, therefore, the D.C. Circuit imposed its understanding of the statute not only in the face of the contrary requirements of *Chevron*, but also against the longstanding recognition of the Commission's authority to exercise the discretion granted by the "supple instrument" handed to it by Congress sixty years ago to develop regulatory policies that promote the national interest in efficient, reasonably priced telecommunications.

Vindication of these longstanding principles is particularly important now, when the FCC is in the midst of supervising the complex transition from monopoly to competitive telecommunications markets. The FCC's exercise of its flexibility thus far has been a success, as demonstrated by the existence of the *amici* here and the important role they play in bringing innovative services to the public.

The court below disregarded the authority given the FCC by the plain meaning of the statute to excuse nondominant carriers from filing tariffs. Moreover, the court did not acknowledge, let alone apply, its obligation to

defer to the FCC's reasonable interpretation of the Act. As a result, the court's decision must be reversed.

A. Congress Has Directly Spoken to the Question at Issue by Providing the Commission with Authority to Modify Any Requirement of Section 203, Including the Tariffing Requirement

Amici fully concur in the submission of the Solicitor General that "the FCC's policy is not merely a reasonable interpretation of the statute, it is the correct one." 93-521 Pet. at 14. As this Court's post-*Chevron* decisions have explained, the inquiry under step one of the analysis is an effort to "ascertain[] the plain meaning of the statute, * * * look[ing] to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988).[7] These traditional tools of statutory construction establish that the FCC correctly determined that its permissive detariffing decisions were authorized by the Communications Act.

a. As the Court has repeatedly noted, all statutory construction must begin with the text of the statute itself. *See, e.g., Negonsott* v. *Samuels*, 113 S. Ct. 1119, 1122-23 (1993); *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). The "particular statutory language at issue" in this case, *K Mart Corp.*, 486 U.S. at 291, is quite broad. Section 203(b)(2) gives the Commission power "in its discretion and for good cause shown," to *"modify any requirement made by or under the authority of this section* either in particular instances or by general order applicable to special circumstances or

[7] *See Sullivan* v. *Everhart*, 494 U.S. 83, 89 (1990); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (using "ordinary canons of statutory construction" to ascertain meaning of the statute); *Chevron*, 467 U.S. at 843 n.9 (inquiry into meaning of statute is to be conducted "employing traditional tools of statutory construction"). *See also* Merrill, 101 Yale L. J. at 990-992 (describing evolution of *Chevron* step one analysis).

conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." 47 U.S.C. § 203(b)(2) (emphasis added). The "requirements" of Section 203, of course, include the tariff filing requirement of Section 203(a).[8] The D.C. Circuit, however, found that the Commission, in excusing some carriers from the tariffing requirement while continuing to apply it to dominant carriers, did not "modify" that requirement. This decision was plainly in error.

The D.C. Circuit's decision rested on the definition of "modify" found in *Black's Law Dictionary* (5th ed. 1979). Pet. App. 53a. That dictionary defines "modify" as "[t]o alter; to change in incidental or subordinate features; enlarge; extend; amend; limit; reduce." *Black's* at 905. In determining that the authority to "modify" permitted only *"circumscribed* alterations," Pet. App. 53a (emphasis added), the court below apparently emphasized the portion of the definition concerning changes in "incidental or subordinate features." Even this source, however, does not so limit the meaning of the word. Thus, for example, *Black's* also defines "modify" as "amend," "limit," or "reduce." None of these definitions is qualified with any

[8] The D.C. Circuit apparently believed that its decisions were supported by the observation that Congress, in using the word "shall" in section 203(a), employed the language of command. *See* Pet. App. 52a. We have no quarrel with this observation. *But see Young* v. *Community Nutrition Institute*, 476 U.S. 974 (1986) ("shall" may in some circumstances be permissive). But use of the term "shall" merely establishes that Congress in fact imposed a "requirement"—which it then expressly gave the Commission the authority to "modify." *See Webster's Ninth New Collegiate Dictionary* 1002 (1989) (definition of "require" includes "to impose a compulsion or command on").

Indeed, the only "requirement" of Section 203 that is not expressly conditioned on the Commission's discretion to adopt regulations (*e.g.*, "as the Commission may by regulation require") is the basic tariffing requirement of Section 203(a). Thus, unless it applies to that requirement, the Commission's modification authority under Section 203(b)(2) would be wholly superfluous.

reference to "incidental or subordinate features." Nor does the ordinary, plain meaning of the term "modify" include any such limitation.[9] *Webster's Ninth New Collegiate Dictionary*, for example, defines "modify" as *either* "to make minor changes in" *or* "to make basic or fundamental changes in order to give a new orientation to or to serve a new end." *Id.* at 763. And this Court has observed elsewhere that "the word 'modify' * * * in its broadest sense * * * encompass[es] *any* change or alteration * * *." *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985) (emphasis added).[10]

It is also evident from the "precise language at issue" that Congress, rather than limiting the Commission's authority to modifications a court might find "incidental" or "subordinate," intended the broader definition of "modify" to apply here. Congress directly and expressly gave the Commission the authority to modify *"any"* requirement of Section 203. There is no basis in this language, or in the accepted meaning of the word "modify," to hold that only "circumscribed alterations" are permissible.

Under the precise language of the statute, then, it is plain that the permissive detariffing policy does not exceed statutory authority. By permitting non-dominant carriers

[9] Congress is presumed to intend the ordinary meaning of the words it uses. *Russello* v. *United States*, 464 U.S. 16, 21 (1983); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).

[10] This Court has suggested that "[t]he existence of alternative dictionary definitions * * *, each making some sense under the statute, itself indicates that the statute is open to interpretation." *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992). The mere existence of alternative dictionary definitions does not compel analysis under *Chevron*'s second step in this context. As we explain, other features of the Communications Act demonstrate that only one of the alternative dictionary definitions—the broad one—makes "some sense under the statute." This Court has found a statute to be unambiguous even where alternative dictionary definitions exist. *See, e.g., Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992); *Ardestani* v. *INS*, 112 S. Ct. 515 (1991); *United States* v. *James*, 478 U.S. 597 (1986). *See also* Sunstein, 90 Colum. L. Rev. at 2091 & n.97.

to forego filing tariffs, the Commission simply relied on its authority to "modify"—to change, alter, or amend—"any" requirement of Section 203, including the tariff filing requirement of Section 203(a).

2. In addition to the precise language at issue, the language and structure of the Act as a whole confirm the Commission's understanding of the statute. We believe—as the Commission did—that the statute contains three specific indications of congressional intent, each confirming the authority of the Commission to adopt permissive detariffing.

First, Section 203(b)(2) contains one—and only one—express limitation of the authority to "modify any requirement": "the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." The existence of an express limitation on the authority to modify strongly confirms that the Congress meant what it said when it otherwise gave the Commission authority to "modify *any* requirement" of Section 203. *See Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1163 (1993); *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). In its Brief in Opposition, AT&T offered no contrary explantion for this express qualification on the FCC's modification authority.

Second, the section of the Act immediately following the express grant of authority to modify clearly contemplates that some carriers will be excused from the tariff filing requirement. Section 203(c), which was ignored by the court below, provides that "[n]o carrier, *unless otherwise provided by or under the authority of this chapter*, shall engage or participate in [interstate and foreign wire or radio] communication unless schedules have been filed and published in accordance with the provisions of this subchapter and with the regulations made thereunder" (emphasis added). The plain meaning of this provision

is that it may be "provided"—here, by the Commission—"under the authority of this chapter" that some carriers may engage in such communications *without* filing and publishing schedules of charges.[11]

Third, Congress recently adopted another provision of the Act, 47 U.S.C. § 226(h)(1)(A), confirming that it shares the FCC's interpretation of Section 203. That provision, adopted as part of the Telephone Operator Consumer Services Improvement Act of 1990, imposed on non-dominant carriers offering operator services the duty to file informational tariffs. Because the information required by such tariffs would be largely contained in any tariffs filed under Section 203(a), this additional requirement of the 1990 statute would have been redundant if these non-dominant carriers were required to file tariffs under the Act. But Congress plainly did not intend to adopt a redundant regulatory requirement. Rather, fully aware of the Commission's permissive detariffing policy,[12] Congress determined that a limited form of tariffing should be reimposed on providers of certain services. Whether considered as congressional acquiescence,[13] or simply as

[11] AT&T has complained that this argument ignores the second clause of Section 203(c), which, it says (without bothering to quote the clause), "prohibits charging rates other than those filed in tariffs." Opp. at 16. But the second clause of Section 203(c) prohibits a carrier from charging a different rate for communications "between the points named *in any such schedule* than the charges specified *in the schedule then in effect*" (emphasis added). This restatement of the filed rate doctrine, discussed *infra* at 28 to 29, applies by its own terms only to those circumstances where a schedule has been filed and is in effect. Rather than "prohibiting rates other than those filed in tariffs," the statute clearly prohibits only rates other than those specified in any tariff that is actually filed (either by Commission mandate or voluntarily).

[12] *See FCC and NTIA Authorizations: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. 30 (1989); S. Rep. No. 439, 101st Cong., 2d Sess. 3-4 & n.10 (1990); H.R. Rep. No. 213, 101st Cong., 1st Sess. 3, 5-6 (1989).

[13] *See National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. at 1402 (finding agency's interpretation permissible where "statutory addition enacted by the Congress," which did not modify the specific language at issue, "confirms the [agency's] view" and contrary interpretation "would make the amendment superfluous").

additional statutory evidence of the scope of Section 203(b)(2), the requirement of Section 226(h)(1)(A) confirms the Commission's interpretation of the statute it administers.

3. In reaching its contrary conclusion, the D.C. Circuit below relied for its statutory construction exclusively on its earlier decision in *AT&T* v. *FCC*, *supra*, which in turn relied on its 1985 decision in *MCI* v. *FCC*, *supra*. *See* Pet. App. 2a, 52a-53a. Although the *AT&T* court found that the argument from the express authority of Section 203(b)(2) was "not insubstantial when made initially," *id.* at 52a, it rejected the Commission's view on the basis of its earlier decision in *MCI*. The *AT&T* court, however, did not recognize that the *MCI* decision was reached without the benefit of the subsequent congressional action discussed above, which demonstrated Congress's agreement with the FCC's interpretation of Section 203 as allowing "permissive detariffing." More importantly, the *AT&T* court overstated the relevance of the *MCI* decision here; the reasoning of that decision plainly does not compel affirmance of the D.C. Circuit's erroneous decisions on permissive detariffing.[14]

The *MCI* case arose out of the Commission's *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), in which

[14] AT&T has suggested that the decision below was based on the doctrine that "judicial construction of a statute binds subsequent courts and eliminates 'any issue of deference to the [agency].'" Opp. at 19 (quoting *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847 (1992)). But even if the D.C. Circuit's decision was mandated by its earlier *AT&T* decision, that decision certainly was not mandated by the *MCI* decision, which expressly reserved the question at issue here. None of these decisions, of course, binds *this* Court. *See generally* Jahan Sharifi, *Precedents Construing Statutes Administered by Federal Agencies After the* Chevron *Decision: What Gives?*, 60 U. Chi. L. Rev. 223 (1993).

it *prohibited* carriers from filing tariffs. The issue, therefore, was "whether the Commission has statutory authority to *prohibit* common carriers from filing tariffs * * *." Opp. App. 3a (reproducing *MCI* decision) (emphasis in original). The court held that the Commission, by prohibiting the filing of the tariffs, had not adopted the "circumscribed alterations" permitted by Section 203(b)(2) but rather had adopted a "*wholesale* abandonment or elimination of a requirement.' *Id.* at 11a (emphasis added). The court viewed the mandatory detariffing policy before it as "*fundamentally*" different from the permissive detariffing policy at issue here. *Id.* at 8a (emphasis added). It specifically noted that "we do not reach the question whether the FCC's earlier permissive orders are invalid." *Id.* at 20a.

The D.C. Circuit's subsequent *AT&T* decision relied on the *MCI* opinion—which, as noted, expressly reserved the issue presented in *AT&T* and here—with little analysis. Rather, the court simply repeated the language of *MCI* and concluded: "Whether detariffing is made mandatory, as in the *Sixth Report*, or simply permissive, as in the *Fourth Report*, carriers are, in either event, relieved of the obligations to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to 'modify' requirements of the Act." Pet. App. 53a. This *ipse dixit*, however, provides no support for the Court's extension of the *MCI* holding on mandatory detariffing to the "fundamentally" different permissive detariffing policy at issue here.

The *MCI* decision stands only for the proposition that the authority provided in Section 203(b)(2) does not permit the "wholesale abandonment or elimination" of Section 203(a) such that carriers are prohibited from filing tariffs. The court thereby protected the *opportunity* to file tariffs that also is present in Section 203. Some carriers had noted affirmative reasons why they might wish to retain tariffs, including simplification of contracting with customers and coordination with corresponding

tariffs for intrastate services. *See Sixth Report and Order*, 99 F.C.C.2d at 1024-25 & n.13. They argued that Section 203 allowed them to maintain interstate tariffs on file with the FCC, even if the FCC itself had no material interest in the tariffs for its own purposes, and was willing to make such filings voluntary.

But unlike the mandatory detariffing at issue in *MCI*, permissive detariffing does not constitute "wholesale abandonment or elimination" of the requirements of Section 203. Rather, the Commission, "in its discretion and for good cause shown," Section 203(b)(2), modified the requirement by making the mandatory element of that section applicable only for tariffs that are not presumptively lawful—*i.e.*, tariffs of carriers with market power. The FCC also retained regulation of other carriers through its complaint process and investigative powers.

It is one thing to hold that the Commission may not modify a statutory command by turning it into a prohibition—the action the D.C. Circuit condemned in *MCI*—thereby affecting carriers' opportunity to file tariffs if they wish. But it is quite something else to say that the Commission may not modify the command by excusing some carriers from compliance where the Commission itself has no further need for the relevant tariff filings to meet its statutory duties. In the language of the D.C. Circuit, the former is more plainly a "wholesale elimination or abandonment," while the latter bears the characteristics of an alteration that is "circumscribed," *i.e.*, limited in its application. Thus, even if the *MCI* case accurately describes the boundaries of the statutory authority (an issue this Court need not reach), that case does not compel the decision reached by the D.C. Circuit in the "fundamentally" different context presented here.

B. At a Minimum, the FCC's Construction of the Statute it Administers is Reasonable and Entitled to Deference from the Courts

Although this case may be resolved on the basis of the plain evidence of the statute's meaning, the foregoing demonstrates, at a minimum, that the agency's construction of the statute is a permissible one entitled to deference under *Chevron*. As the *Chevron* Court explained, an agency's interpretation of an ambiguous statute is entitled to deference so long as it " 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.' " 467 U.S. at 845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)). Once a court determines that the issue is not definitively resolved by the statute, "it is incumbent upon [the party challenging the agency's interpretation] to establish that the agency's construction is inconsistent with the structure and purpose of the statute and therefore impermissible." Silberman, 58 Geo. Wash. L. Rev. at 827. AT&T cannot carry that burden here.

When analyzing an agency construction of a statute under step two of the *Chevron* test, this Court has deferred to any reasonable or rational agency construction.[15] As the Court observed just last Term:

> [W]here the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction. We should be especially reluctant to reject the agency's current view, which, as we see it, so closely fits "the design of the statute as a whole and * * * its object and policy." [*Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2161 (1993) (quoting *Crandon* v. *United States*, 494 U.S. 152, 158 (1990)).]

[15] *See, e.g., Estate of Cowart*, 112 S. Ct. at 2594 (deference is owed to a "reasonable" statutory interpretation from an administering agency); *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. at 2535 (agency position "entitled to deference" so long as it is reasonable); *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987) (question is whether agency's construction is "rational and consistent with the statute"); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. at 125 (agency's construction sustained if it is a "sufficiently rational one").

We have already demonstrated that the agency's construction fits closely with the language and design of the statute. We explain below that this construction—which even the D.C. Circuit called "not insubstantial," Pet. App. 52a—also is a reasonable implementation of the object and policy that guide the statute.

1. Section 1 of the Communications Act, 47 U.S.C. § 151, imposes on the FCC the mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." This directive was given "at a time when there was little or no competition in telecommunications." *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d at 359. However, as new technological and legal developments permitted the introduction of competition into certain market segments, the FCC recognized its obligation under Section 1 to foster such competition to improve telecommunications efficiency and choice for consumers, as well as to reduce prices. As discussed above, in the *Competitive Carrier Rulemaking* the FCC adopted regulatory policies applicable to new entrants, including a finding that the rates and service terms of competitors are presumptively lawful. Again, this conclusion has never been challenged, and will remain a governing principle however the Court decides this case. *See supra* at 3-4.

It follows that when the FCC construed Section 203, it reasonably concluded that the modification authority provided there was broad enough to permit it to excuse nondominant carriers from filing tariffs that the Commission did not require in order to meet its statutory obligations. Permissive detariffing was a small and logical step.

The Court should recognize that even though the FCC has created a presumption that non-dominant carrier rates are lawful (and excused tariff filing on that basis as unnecessary), the Commission at all times has retained full authority to examine such rates upon customer complaint or its own motion. *See, e.g., Second Report and Order,* 91 F.C.C.2d at 70; *Fourth Report and Order,* 95 F.C.C.2d at 556. Non-dominant carriers must stand ready to file relevant rate information upon request, and have that information evaluated under the statutory standards. Thus, in no respect did the Commission abandon its fundamental responsibility to protect consumers from unlawful rates when it exercised its modification discretion under Section 203(b)(2).

The FCC's construction of Section 203 is even more clearly reasonable given the affirmative harm the Commission found that mandatory tariff filing would do to its general obligations under Section 1. As early as 1979, in the first notice in the *Competitive Carrier Rulemaking,* the FCC expressed concern that "some of the potential public benefits which we had hoped would flow from freer entry have been frustrated, in part, by continued adherence to rules and procedures governing tariff filings * * * designed primarily for carriers with dominant market positions and monopoly services." *Notice of Inquiry and Proposed Rulemaking,* 77 F.C.C.2d at 330. *See also id.* at 309. For example, the FCC found that tariff requirements imposed significant impediments to market entry, for the direct costs of preparing, filing, and maintaining a current tariff are substantial. *Id.* at 359.

These costs take on heightened significance in the context of firms with little or no market power trying to break in against a longstanding industry giant. From the time of its initial notice in 1979, the Commission has repeatedly found that tariff filings in the context of an otherwise competitive market would likely have *anticompetitive* effects. As the FCC explained, carriers attempting to compete "must either offer services unavailable

from the established carriers or, more likely, offer services with rates, conditions and practices more favorable than those offered by the established carriers." *Id.* at 324. The FCC saw that dominant monopoly carriers could use the tariff process to squelch such competitive market developments. *Id.* The Commission further found that continued regulation of non-dominant firms would "discourage the introduction of new, competitive services," act as a barrier to market entry by new firms, and inhibit innovative pricing mechanisms. *Id.*

The FCC has endorsed these conclusions repeatedly in its decade of experience with the deregulation of non-dominant interexchange carriers.[16] For example, the FCC emphasized in the rulemaking directly at issue here its finding that "mandatory tariff regulation of non-dominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the Act because it inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends." Pet. App. 27a.[17]

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[16] *See, e.g., Fourth Report and Order,* 95 F.C.C.2d at 555 n.1 (tariff filing requirements "impede entry, impair competitive pricing, and facilitate collusive conduct") (citing *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 457 (1978) ("the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements")); *Second Report and Order,* 91 F.C.C.2d at 71 (tariff "requirements stifle price competition and service and marketing innovation"); *Further Notice of Proposed Rulemaking,* 84 F.C.C.2d at 454 ("Tariff posting * * * provides an excellent mechanism for inducing noncompetitive pricing").

[17] The FCC has endorsed the fundamental conclusions supporting its regulatory decisions even after the D.C. Circuit issued the decision below. In response to the *AT&T* decision, the Commission "reaffirm[ed]" its "policy findings, adopted nearly a decade ago in *Competitive Carrier,* and conclude[d] that * * * traditional tariff regulation of nondominant carriers is not only unnecessary to insure just and reasonable rates, but is actually counterproductive * * *." *Tariff Filing Requirements for Nondominant Carriers, Memorandum Opinion and Order,* 8 FCC Rcd. 6752, 6752 (1993) (footnote omitted) (*"Rate Range Order"*), *appeal pending sub nom.*

2. The Commision's judgment that the permissive detariffing modification serves the goals of the Communications Act has been confirmed by its actual effect on the marketplace for long distance services. As the Commission noted below, "permissive detariffing has proven to be a success over the years, as evidenced by the robust competition in the interexchange [long distance] market and the increased choices for consumers with respect to carriers and prices." *Id.* at 29a. Such choices advance Section 1's mandate of "adequate facilities at reasonable charges."

Amici are a product of the Commission's actions. Consumer options have increased dramatically under permissive detariffing: "In 1982, approximately a dozen long distance carriers operated within the United States. By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers." *Id.* at 30a. AT&T's share of the market, while still large enough to secure its place as the dominant carrier, "declined from over 80% to just more than 60%, while its rates for directly dialed interstate [service] have also fallen substantially." *Id.*[18]

Given the costs and negative effects resulting from tariff filings by non-dominant carriers, the FCC's decision to free those carriers from the obligation to make such filings plainly was a substantial factor in this market maturation. Indeed, the Competitive Telecommunications Association told the FCC that many of the companies

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Southwestern Bell Corporation v. *FCC*, Nos. 93-1562 *et al.* (D.C. Cir. filed Aug. 30, 1993). Nevertheless, the FCC was constrained to impose some type of tariff regulation on nondominant carriers because the court below had held that filed tariffs are required by the Act.

[18] The FCC has reported that "[b]y mid 1993, about 72% of the nation's [telephone] lines were presubscribed to AT&T, 15% to MCI and 6% to Sprint," with "[o]ver four hundred smaller carriers" accounting for the remainder of the interstate long distance industry. FCC Industry Analysis Division, *Long Distance Market Shares, Third Quarter, 1993* at 3 (December 1993).

operating in the market "would not be in existence today were it not for the Commission's policy of encouraging competition in the telecommunications marketplace through the lifting of unnecessary and burdensome regulations." Reply Comments of the Competitive Telecommunications Association at 11.[19]

Perhaps the most compelling confirmation that permissive detariffing fosters the Act's general purpose is the unanimity of the *users* of long distance telecommunications services in support of the policy. For example, the Ad Hoc Telecommunications Users Committee (the ongoing representative of major corporate telecommunications departments on regulatory issues), called the Commission's policy "a major regulatory success story" as a result of which "[c]ompetition has burgeoned in the long-distance marketplace." Comments at 3. Likewise, the International Communications Association, which describes itself as "the largest association of telecommunications users in the world," observed that the permissive detariffing policy permits non-dominant common carriers "to make rapid, efficient responses to changes in demand and cost * * * and price competitively," all without any detriment to users. Comments at 5.

In short, the FCC's detariffing policy has served the goals of the Communications Act well, just as the Commission hoped when it announced that policy over a decade ago. Adopted at a time of almost no competition

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[19] Citations to comments are to those comments received by the FCC in response to *Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking*, 7 FCC Rcd 804 (1992), the proceeding that led to the decision at issue here.

See also Comments of OCOM Corporation at 8 ("Many of the smaller carriers today would not be here now or be able to continue offering competitive services under a more burdensome regulatory structure." Permissive detariffing is "critical to the survival of a substantial number of nondominant interexchange carriers"); Reply Comments of the United States Commerce Department's National Telecommunications and Information Administration at 5.

in the market for long distance services, the policy has enabled hundreds of new firms to enter and begin to compete effectively by offering innovative service and rate plans. Prices for long distance service have decreased dramatically. There is no evidence of widespread violations of the substantive pricing prohibitions in Sections 201(b) and 202(a) of the Act. Nothing has led any party to ask the FCC to reconsider its finding that non-dominant carrier rates are presumptively lawful.

These substantial marketplace benefits, however, could easily be lost, and further development of competition stunted, if the decision below stands. A mandatory tariff requirement on non-dominant carriers necessarily curbs those carriers' ability to offer innovative price and service plans to meet customer needs as they arise. *See Further Notice of Proposed Rulemaking,* 84 F.C.C.2d at 454. This is true even though the FCC has attempted to minimize the tariff burden on non-dominant carriers as it responds to the court of appeals decision here. The Commission has permitted non-dominant carriers to file so-called rate range tariffs setting forth minimum and maximum rates and offering prices within the bands. *See Rate Range Order, supra.* Even these tariffs impose unnecessary burdens on carriers, and in any event AT&T and certain local telephone companies have challenged the Commission's *Rate Range Order* based on the same court of appeals decision at issue here. *See Telecommunications Reports,* Sept. 13, 1993, at 22. In a long distance market where one firm still controls more than 60 percent of the business, any reduction in the pressure of competition is likely to be damaging to that market's further development.[20]

[20] It should be emphasized that as the long distance marketplace has become more competitive, the FCC also has substantially relaxed its regulation of AT&T to permit AT&T to respond to that competition. Today virtually all AT&T tariffs also are considered presumptively lawful. AT&T has broad freedom to negotiate prices with customers on a competitive basis, and then file simple tariffs reflecting the rates and other major elements of the resulting contracts. *See Competition in the Interstate Interexchange Marketplace, Report and Order,* 6 FCC Rcd 5880, 5882, 5894, 5897 (1991). Given AT&T's continued domination of the long distance market, the FCC has not been willing to excuse AT&T altogether from filing tariffs—the FCC still sees the need to oversee AT&T's conduct to that extent. However, AT&T has recently filed a request for the FCC to extend permissive detariffing to it as well; that request is now under consideration by the Commission. Motion for Reclassification of AT&T as a Nondominant Carrier, filed by AT&T in the *Competitive Carrier Rulemaking* (Sept. 22, 1993).

3. The statutory purposes served by the permissive detariffing modification are not limited to the long distance arena. The FCC has concluded that this policy is equally required for the development of other markets where telecommunications competition is far less advanced.

Local telephone service is a prime example. This multi-billion dollar market is now the domain of the Bell Operating Companies and other local exchange telephone companies ("LECs"). But like the long distance market in the early 1980s, the local telephone market is the focus of increasing competition.[21]

The Association for Local Telecommunications Services ("ALTS") explained in comments before the FCC that its member non-dominant competitive access provides ("CAPs") "attempt to compete directly with dominant local exchange carriers" by "deploy[ing] innovative technologies—including fiber optic and microwave networks" —in metropolitan areas across the country. ALTS Com-

[21] As the Commission has explained: "For many years, local exchange carriers (LECs) faced little or no competition in providing the local access facilities and services used in the provision of interstate communications. Recent changes, however, have facilitated the development of competition in the provision of these facilities and services." *Expanded Interconnection with Local Telephone Company Facilities ("Expanded Interconnection"), Notice of Proposed Rulemaking and Notice of Inquiry,* 6 FCC Rcd 3259, 3259 (1991).

ments at 1-2. Thus, for example, *amicus* Metropolitan Fiber Systems "operates state-of-the-art digital fiber optic telecommunications networks in the business districts" of cities throughout the United States. Comments of Metropolitan Fiber Systems at 2. *See also* Comments of Local Area Telecommunications, Inc. at 1 (company provides "a broad range of * * * competitive access services, primarily via microwave facilities"). Nevertheless, the CAP share of the total market for local telephone exchange services remains less than one percent. ALTS Comments at 5-6.

The Commission has recently adopted new local exchange policies to begin what it calls "the process of opening the remaining preserves of monopoly telecommunications service to competition." *See, e.g., Expanded Interconnection, Report and Order and Notice of Proposed Rulemaking,* 7 FCC Rcd 7369, 7372 (1992). In that context, the Commission noted the success of its deregulatory approach toward long distance services. *Id.* at 7378. The FCC similarly believed that greater competition in the local telephone market should increase "incentives for efficiency and encourage deployment of advanced technologies facilitating new and innovative services." *Expanded Interconnection, Second Report and Order and Third Notice of Proposed Rulemaking,* 8 FCC Rcd 7374, 7383-84 (1993). The Commission has taken several actions to foster competition in the local telephone market, and further proposals are pending.[22]

The FCC's steps to promote new local service competition have taken place against a background of permissive detariffing for non-dominant CAPs,[23] supported by the

[22] *See, e.g., Expanded Interconnection, Second Notice of Proposed Rulemaking,* 7 FCC Rcd 7740, 7747-49 (1992).

[23] *See, e.g., Tariff Filing Requirements for Nondominant Common Carriers, Notice of Proposed Rulemaking,* 8 FCC Rcd 1395, 1397 (1993) ("Since their inception, CAPs have not been burdened by interstate tariff filing requirements").

same FCC statutory construction and policy conclusions arrived at in the *Competitive Carrier Rulemaking* described earlier. Under the decisions below, however, the Commission has been required to reimpose tariff regulation on the CAPs along with all other non-dominant carriers.[24] Such regulation substantially and unnecessarily interferes with the still-emerging competition in the local market, no less than it would have interfered with new long distance competition a decade ago. CAPs face substantial hurdles to market entry, including the need for massive capital investment and vigorous price competition from the reigning monopolists. As ALTS explained below, "[i]mposition of a mandatory tariffing obligation would impose a substantial economic burden on such carriers. The costs associated with the preparation and maintenance of federal tariffs—legal and consulting fees, the diversion of personnel, the filing fees—constitute an expense the CAPs can ill afford." ALTS Comments at 6-7. More important, mandatory tariffing can provide an opportunity for the dominant LECs to bring price and service rigidity to the marketplace, thereby discouraging innovations CAPs might offer in service or price and stifling the newborn competitors.

Local telephone competition holds the promise to revolutionize the nation's telecommunications infrastructure. The FCC envisions a future in which multiple carriers—local and long distance, mobile and wireline—interconnect with one another and compete to offer business and residential users advanced quality services at lower prices. To reach that goal—the goal mandated by Section 1 of the Communications Act—the FCC will need all the flexibility provided by the Act. In these circumstances, the FCC's construction of Section 203 is entirely reasonable and demands deference from the judicial branch.

[24] *See Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order,* 8 FCC Rcd 6752, 6754 (1993).

II. THE FCC'S DECISION DID NOT IMPLICATE THE FILED RATE DOCTRINE, WHICH DOES NOT SPEAK TO THE QUESTION OF WHEN RATES MUST BE FILED

This is not a filed rate doctrine case. Indeed, under the FCC's decision hundreds of non-dominant carriers filed no tariffs, and hence had no "filed rate". *Amici* make this observation only because AT&T has placed tremendous weight on the filed rate doctrine here, and particularly on the Court's application of that doctrine in the context of a different regulatory statute in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). In its opposition to the petitions for certiorari, for example, AT&T repeatedly asserted that the D.C. Circuit's decision below was 'required * * * by a long line of this Court's decisions culminating in *Maislin*." Opp. at 1. *See also id.* at 5 (the decision in *Maislin* "elimnated any possibility that the FCC, might have the authority that MCI claimed"); 7, 9-14, 19-20.[25] But the decision

[25] The D.C. Circuit in *AT&T*, by contrast, observed in a footnote only that its decision was "somewhat buttressed" by *Maislin* and cited the "shared lineage" of the Communications Act and the Interstate Commerce Act. Pet. App. 53a-54a n.12. This genealogical approach to statutory interpretation, however, cannot substitute for a precise examination of the language at issue, which both the D.C. Circuit below and AT&T in this Court have declined to offer. As the petitioners demonstrated in their replies to the opposition to the petitions, the language of the Communications Act is different in vital respects from that of its ancestor the Interstate Commerce Act. *Amici* agree with petitioners that *Maislin*, which discusses the filed rate doctrine in the context of the Interstate Commerce Act, does not control how the doctrine would be applied under the Communications Act, and in any event that decision is irrelevant here. To the extent that reasoning by analogy to other regulatory contexts is appropriate, a more apt analogy is to this Court's decision in *Permain Basin Area Rate Cases*, 390 U.S. 747 (1968), in which the Court endorsed the Federal Power Commission's regulatory decisions that "began a new era in the regulation of natural gas producers." *Id.* at 755.

below was in no way compelled (as AT&T contends) by the filed rate doctrine.

Properly understood, AT&T's extreme reliance on *Maislin* is a red herring. The filed rate doctrine involves the relative enforceability of inconsistent contract and tariff terms; it provides that in such a case a bona fide tariff provision governs. The specific question in *Maislin* was "the validity of [an ICC] policy * * * that relieves a shipper of the obligation of paying *the filed rate* when the shipper and carrier have privately negotiated a lower rate." 497 U.S. at 119 (emphasis added). The resolution of that question, the Court found, rested on a straightforward application of the filed rate doctrine: the filed tariff rate applied.

This case, by contrast, involves the entirely different question of whether a tariff rate is required in the first place. The filed rate doctrine has nothing to say about this question. None of the filed rate doctrine cases AT&T cites involves an interpretation of the scope of the tariff filing requirement. The question at issue in this case is not answered by citation of the doctrine; it is instead answered by the specific language of the Communications Act. *See Maislin*, 497 U.S. at 136 (Scalia, J., concurring) ("prior 'filed-rate' decisions * * * were based not on the 'regulatory scheme as a whole,' * * * but rather on the text of the statute"). Based on its reasonable interpretation of Section 203, the FCC properly relieved non-dominant carriers of the obligation to file tariffs at all.

CONCLUSION

For the foregoing reasons, and those in the briefs of petitioners, this Court should reverse the decision below.

Respectfully submitted,

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